Supreme Court, U.S.
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No. 95-1391

In the Supreme Court of the United States

October Term, 1995

DUNSTABLE-GROTON CORP.,
ASSIGNEE OF J & C HOMES, INC.,
PETITIONERS,

v.

VIRGINIA C. WOOD, ROBERT J. APPLETON, JR., GARY HOGLUND, ANNA E. LENOS, ROBERT J. LEWIS, CAROLYN A. PERKINS, AND RICHARD POWELL, AS THEY ARE MEMBERS OF AND CONSTITUTE THE PLANNING BOARD OF GROTON,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED FOR REVIEW

The question presented is whether the Massachusetts appellate courts have denied a real estate developer substantive due process of law by sanctioning a retroactive application of large lot zoning and planning board subdivision regulations in the following circumstances:

In 1976 the developer's assignor submitted to a municipal planning board a definitive subdivision plan which was amended in 1979 and 1980 at the request of the planning board. Although required by state law to "state [its objections] in detail," the board disapproved the plan for purported "lack of information" about drainage. In 1985, the board hired an engineer to find fault with the plan. At a Massachusetts Land Court trial in 1988, eight years after the plan had been disapproved, the engineer detailed, for the first time, the board's objections (two of which survived appeal). The two objections could have been met if the board had disclosed them earlier. On oral argument before the Massachusetts Appeals Court the board's counsel stated that the board would allow the developer to amend its plan to meet the board's objections. The rescripts of the Land Court and the Appeals Court each provided that the developer be entitled to "resubmit its most recent subdivision plan" after complying with the board's valid objections, and proceed under a Massachusetts statute (that provided for revocation of disapproval and approval of the plan conforming to "such regulations" (meaning the regulations in effect in 1976 when the definitive subdivision plan was submitted).

When the developer did so, the board disapproved the plan because it did not conform to regulations and large lot zoning ordinances enacted after the plan had been submitted. On appeal, the Massachusetts Appeals Court held that the developer was not entitled to "grandfathering," and would have to comply with the new zoning; and the Massachusetts Supreme Judicial Court denied further appellate review.

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JURISDICTION

The plaintiff petitions, under 28 U.S.C. § 1651(a), for a writ of certiorari to review the Massachusetts Supreme Judicial Court's denial, on November 29, 1995, *Dunstable-Groton Corp.* v. *Planning Board of Groton*, 421 Mass. 1107, 656 N.E.2d 589 (1995) (A. 11a) of the plaintiff's application for further appellate review of a Massachusetts Appeals Court rescript, *Dunstable-Groton Corp.* v. *Planning Board of Groton*, 39 Mass. App. Ct. 1111, 656 N.E.2d 589 (1995) (A. 16a), retroactively applying regulations and large lot zoning requirements to the plaintiff's definitive subdivision plan, despite an earlier rescript by the Appeals Court (and by the Massachusetts Land Court) and a representation to the Appeals Court by the defendant's counsel that the defendants would permit the plaintiff to amend its definitive subdivision plan to conform to "such regulations," that is, the regulations in effect when the definitive subdivision plan was submitted in 1976.

The fundamental unfairness of the Appeals Court's rescript was raised in the plaintiff's application to the Supreme Judicial Court for further appellate review (A. 4a-5a, 9a).

STATEMENT OF THE CASE

This case entails a widespread problem in the suburban housing development industry: a municipality's arbitrary and unreasonable delay in approving a subdivision plan until the municipality has time to pass a restrictive zoning ordinance and regulations and apply them retroactively, and a state court's sanctioning such practices.

Under Massachusetts law, a developer intending to subdivide a tract follows a two-step process: it submits a preliminary subdivision plan to a municipality's planning board, and after a "dialogue" with the board, *North Landers Corp.* v. *Plan-*

ning Board of Falmouth, 382 Mass. 432, 445, 416 N.E.2d 934, 943 (1981), the developer submits a definitive subdivision plan, which the planning board may approve or disapprove. If the planning board disapproves, it must state its objections to the plan "in detail," M.G.L. c. 41, § 81U, and the developer may litigate the validity of the board's objections, or resubmit a plan meeting the objections. If the resubmission does meet the board's objections, the board is required to revoke its disapproval, *North Landers Corp.* v. *Planning Board of Falmouth*, 382 Mass. 432, 445, 416 N.E.2d 934, 943 (1981), "and approve a plan which, as amended conforms to such rules and regulations . . .," meaning the rules and regulations in effect when the plan was submitted.

By Massachusetts statute, "grandfather" protection is available while the plan is being processed or while it is being litigated. If the plan is ultimately approved, it is subject to the zoning requirements in force when it was initially submitted. M.G.L. c. 40A, § 6; M.G.L. c. 41, § 81Q. The plaintiff's definitive subdivision plan here was never approved by the municipal planning board, because the board, for eight years (between the submission of the plan in 1980 and testimony at the Massachusetts Land Court trial in 1988), did not make known to the plaintiff the grounds on which the board ultimately disapproved the plan.

On July 22, 1976, the plaintiff's assignor submitted to the Planning Board of Groton, Massachusetts (the Board or the Planning Board) a preliminary subdivision plan and, on December 22, 1976, a definitive subdivision plan for a 40-acre tract. (It also submitted the plan to the Groton Board of Health, which found that the lots were suitable for subsurface disposal (A. 22a), a matter that was to become an ultimate focal point, twelve years later, of the Planning Board's objections to the plan.)

After a public hearing, the Planning Board approved the plan, subject to the developer's complying with certain condi-

tions. The Board then met in private to determine those conditions. After litigation establishing that the Board had violated the Massachusetts Open Meeting Law, *J & C Homes, Inc.* v. *Planning Board of Groton*, 8 Mass. App. Ct. 123, 125, 391 N.E.2d 1232 (1979) (A. 80a-83a), the case was remanded to the Board, and, in 1979, the assignor, at the Board's request, modified the drainage plan. It also, again at the Board's request, in 1980, modified the plan to include 29 lots, each consisting of 40,000 or more square feet, in compliance with the zoning then in effect in the town. Those changes were the only amendments to the plan.

From the time of the developer's submitting the preliminary plan in 1976 and May, 1980, when the modified definitive plan was disapproved by the Board, a corporate officer of the developer attended every meeting of the Board that dealt with the plan (A. 32a). At none of these meetings were the two specific objections on which the board ultimately prevailed discussed (A. 33a).

On May 22, 1980, the Board disapproved the plan for alleged "lack of information" and "topographic changes" (A. 37a-38a). On June 12, 1980, the assignor appealed the disapproval to Superior Court Department of the Massachusetts Trial Court, and the case was transferred to the Massachusetts Land Court.

In 1985, the Board hired an engineer, who, at the Land Court trial in 1988, for the first time made known to the developer concerns, two of which were (1) "frost heaves" and "ground water breakout" in the vicinity of two lots and (2) the finished elevation of another lot. If the Board had communicated these objections before 1980 (or thereafter), the developer could have modified the plan to provide for an interceptor drain and for raising the grade of any lot (A. 32a-34a). The Board's engineer conceded at the trial that it would be possible to design an interceptor drain to eliminate the first of these con-

cerns (A. 58a). Raising the elevation of one lot was also easily remediable (A. 34a).

The Land Court upheld the Board's objections on four grounds, two of which were the ones described above. The Land Court's rescript explicitly provided that the developer

> should be entitled to resubmit its most recent Definitive Plan following its compliance with the Board's valid requests. . . . Once . . . [the] plan conforms to such regulations, the Board . . . [should] proceed in accordance with G.L. c. 41, section 81U [*i.e.*, revocation of disapproval and approval] (A. 79a).

The developer appealed to the Massachusetts Appeals Court, which ruled in the Board's favor on the two grounds only: possible "ground water break out" at the two lots and the finished elevation of another lot. In oral argument, a Justice of the Appeals Court asked counsel for the Board whether the Board would let the developer amend to meet these two concerns, and the counsel answered in the affirmative. The Appeals Court's rescript explicitly provided:

> In accordance with G.L. c. 41, section 81U, the plaintiff may resubmit its most recent definitive plan following its compliance with the board's [two] valid requests. . . . (A. 30a).

(These rescripts accord with established Massachusetts law that when a developer resubmits a plan that had been amended to conform, "the board is required to 'revoke its disapproval,'" *North Landers Corp.* v. *Planning Board of Falmouth*, 382 Mass. 432, 446, 416 N.E.2d 934, 943 (1981), if the plan conforms to the rules and regulations in effect when it was submitted.)

The developer then amended its plan to meet these requests, that is, to conform. It provided for an appropriate interceptor drain, and raised the elevation of the other lot in question. It then resubmitted the plan (the same plan it had submitted in 1976 and amended in 1979 and 1980 at the request of the Board).

The Board disapproved the plan on the ground that it did not conform to Board's regulations and zoning by-laws adopted in 1980 and thereafter (A. 65a), after the plan was submitted, which by-laws increased the minimum lot size from 40,000 square feet to 80,000 square feet.

The developer appealed the disapproval to the Land Court. Although ruling that the plan conformed to the 1976 regulations, the Land Court ruled that the developer had to conform to zoning by-laws adopted by the Town after 1976. The developer then appealed to the Appeals Court, which also held that "grandfathering" protection was no longer available because the Board had in the 1988 litigation won on the two points ("ground water breakout" and finished elevation of one lot) (A. 12a-15a). The Appeals Court's decision also provided that the developer would be subject to the zoning in effect when the plan was resubmitted (A. 12a-15a). The Massachusetts Supreme Judicial Court denied the plaintiff's application for further appellate review (A. 11a).

POINT WITH RESPECT TO WHICH A WRIT OF CERTIORARI IS SOUGHT

The plaintiff seeks a writ of certiorari to determine whether the state courts' [1] disposition violates the due process clause of

[1] Action by a state's judiciary may, of course, be state action for Fourteenth Amendment purposes. *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1181 (1948).

the Fourteenth Amendment, because the disposition sanctions arbitrary, unreasonable, and wrongful delay by the municipality in making its objections known to the developer until the municipality has had time to enact restrictive zoning, to be applied retroactively.

WHY CERTIORARI IS APPROPRIATE

To accord a landowner substantive due process under the Fourteenth Amendment, state or municipal action cannot be "unreasonable, arbitrary or capricious. . . ." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741, 754 (1980), *quoting Nebbia* v. *New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 511, 78 L.Ed. 940, 950 (1934). *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 594, 114, 121, 71 L.Ed. 303, 314 (1926) ("clearly arbitrary and unreasonable"). *Washington ex rel Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 122-23, 49 S.Ct. 50, 52, 73 L.Ed. 210, 214 (1928). Also, "the means selected . . . [must] have a real and substantial relation to the object sought to be attained." *PruneYard, supra*, 447 U.S. at 100.

Here, the Groton Planning Board, the Massachusetts Land Court, and the Massachusetts appellate courts acted unreasonably and arbitrarily: the Planning Board by not making its objections to the modified definitive subdivision plan for eight years, the Land Court by permitting them to do so, the appellate courts by ruling that later, large lot amendments to the municipality's zoning ordinances apply retroactively.

By Massachusetts statute, a subdivision plan amended to conform, so long as it is the same basic plan, is entitled to be judged by the rules, regulations and by-laws in effect when the plan was originally submitted, and is not to be held to after-adopted rules, regulations or by-laws. This "grandfather"

protection derives from two Massachusetts statutes: one, G.L. c. 40A, § 6 providing (in relevant part):

> If a definitive plan . . . is submitted to a planning board for approval . . ., the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law . . . in effect at the time of the first such submission which such plan . . . [is] being processed under the subdivision control law, and if such definitive plan or an amendment thereof is finally approved, for eight years from the date of endorsement of such approval;

the other, G.L. c. 41, § 81Q, providing for "grandfathering" until "final action has been taken . . . by . . . the board." M.G.L. c. 40A, § 6, para. 5 also protects plans which are the subject matter of litigation while the litigation is pending, by providing:

> When a plan . . . has been submitted to a planning board . . . use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-laws in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal. . . .

The state courts' disposition, that grandfather protection is not applicable because the Board prevailed in the Massachusetts Land Court in 1989, on two points ("ground water breakout" and finished elevation of one lot) ignores what happened

here. Unquestionably the developer would have won on these points if the Board had timely told it about them.[2]

M.G.L. c. 41, § 81U requires that a planning board disapproving a definitive subdivision plan "state in detail wherein the plan does not conform to the rules and regulations of the planning board. . . ." Nowhere in the Board's letter of disapproval (A. 37a-39a) was any detail provided explaining why the plan failed to conform. The letter simply stated that the plan "does not provide adequate information to determine proper drainage, suitability of [the] land for Board of Health review." (A. 37a-38a). The Board of Health had, of course, already stated that the tract was suitable for subsurface drainage (although if subdivided into smaller lots, each would have to be tested). It is doubtful, therefore, whether the board's reason related to public safety, health or welfare. *See Aronson* v. *Town of Sharon*, 346 Mass. 598, 603-04, 195 N.E.2d 341, 344-45 (1964); *Cross* v. *Planning Board of Chelmsford*, 345 Mass. 618, 189 N.E.2d 189 (1963); *cf. Wilson* v. *Town of Sherborn*, 3 Mass. App. Ct. 237, 245, 326 N.E.2d 922, 927 (1975).

Instead of detailing its reasons for disapproving the plan, the Board, in 1985, five years after the amended definitive subdivision plan had been disapproved, hired an engineer to cast about for faults in the plan. The engineer found ten of them (eight of which did not survive litigation). The two that did survive were not made known to the developer until the engineer testified at the Land Court trial in 1988. The 1980 plan provided sufficiently detailed information for the Board, after having hired in 1985 the engineer to find fault, to do so in

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[2] Under Massachusetts law, judicial review of a planning board's decision is confined to the reasons stated by the board for its disapproval, *Fairbairn* v. *Planning Board of Barnstable*, 5 Mass. App. Ct. 171, 173, 360 N.E.2d 668, 670 (1977); *Canter* v. *Planning Board of Westborough*, 4 Mass. App. Ct. 306, 307, 347 N.E.2d 691, 692 (1976) (and cases cited), here, lack of information about drainage. However, the Land Court, over the developer's objection, permitted the board's engineer to specify its grounds for disapproval.

detail in 1988, including information that enabled the engineer to specify objections to "ground water breakout" and the finished elevation of one of the lots. If the plan provided information adequate to make these objections in 1988, it also provided information adequate for the Board to have stated them (and its other eight reasons) when the plan was submitted, reviewed and disapproved in 1980.

If the Board had stated its objections in detail at any time between 1980 and 1988, the plan could easily have been amended to conform to the Board's objections. In short, the developer was held retroactively to objections the Board did not inform it of for eight years after the board disapproved the plan. Retroactivity is, of course, "disfavored." *See Landgraf* v. *USI Film Prods.*, ___ U.S. ___, ___, 114 S.Ct. 1483, 1503, 128 L.Ed.2d 229 (1994) (retroactivity of statute). And, as the Massachusetts Supreme Judicial Court has recognized, "[f]ailure of the board to make clear its reasons for disapproval . . . deprives the developer of . . . [a] statutory right [to have the board revoke its disapproval]." *North Landers Corp.* v. *Planning Board of Falmouth*, 382 Mass. 432, 446, 416 N.E.2d 934, 943 (1981).

Furthermore, the Board disapproved the plan despite the earlier Land Court and Appeals Court rescripts that specified that the developer was entitled to "resubmit" its definitive plan to comply with the Board's objections and, that done, "the Board . . . proceed in accordance with [G.L. c. 41, § 81U]" (*i.e.*, revocation of disapproval and approval), and despite the assurance by the Board's counsel in oral argument before the Appeals Court that that would be done. The developer here had a "legitimate claim of entitlement," *Littlefield* v. *City of Afton*, 785 F.2d 596, 600 (8th Cir. 1986), to approval of its plan after it was amended to meet the planning board's two valid concerns, rather than a mere "unilateral expectation," *Landmark Land Co. of Okla., Inc.* v. *Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989), of approval.

Not only did the board's delay, and the Massachusetts appellate courts' sanctioning of it, deprive the developer of a state statutory right, it also deprived the developer of substantive due process of law under the Fourteenth Amendment, because these actions were "clearly arbitrary and unreasonable." The developer, intent on complying, was kept from complying because it was kept ignorant of what were the specific objections of a board implacably opposed to the plan, and then the developer was held to later-enacted, large-lot zoning requirements.

Balancing the harm to the developer against the benefit to the Town, the harm to the developer is great, any benefit to the Town questionable. After a costly delay of sixteen years (years made more costly by expensive litigation), the developer is now saddled with zoning requirements that dramatically lower its potential return. Whether the goal the Town sought to attain — to limit residential development to large-lot zoning — serves any legitimate public purpose is questionable. Large-lot zoning serves to exclude and stratify. *See Kavanewsky* v. *Town of Warren*, 160 Conn. 397, 403, 279 A.2d 567, 570 (1971) (to keep a town rural is not a goal within the general welfare and does not justify increasing minimum lot size); *accord Aronson* v. *Town of Sharon*, 346 Mass. 598, 604, 195 N.E.2d 341, 345 (1964).

This case is worthy of consideration not only because the state courts' disposition sanctions an arbitrary and unreasonable result, but also because the problem typified by this case, that of arbitrary, unreasonable, or wrongful delay is widespread. *See* Anno., "Retroactivity of Zoning Law," 50 A.L.R.3d 596,

660 *et seq.*; *see, e.g., Steel Hill Development, Inc.* v. *Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972).

Respectfully submitted,

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APPENDIX A.

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH

No.

MIDDLESEX COUNTY

DUNSTABLE-GROTON CORP.,
ASSIGNEE OF J & C HOMES, INC.,
PLAINTIFF-APPELLANT,

v.

PLANNING BOARD OF GROTON,
DEFENDANT-APPELLEE.

PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

REQUEST FOR FURTHER APPELLATE REVIEW

Now comes the plaintiff in the above-entitled action and requests leave to obtain further appellate review.

PRIOR PROCEEDINGS

On July 22, 1976, the plaintiff's assignor submitted to the Planning Board of Groton (the Board or the Planning Board) a preliminary subdivision plan and, on December 22, 1976, a definitive subdivision plan for a 40-acre tract (A. 48). It also submitted the plan to the Groton Board of Health, which found that the lots were suitable for subsurface disposal (A. 75, 157), a matter that was to become an ultimate focal point of the Planning Board's objections to the plan. In 1977, the Board of Health wrote to the Planning Board that, if the land were further subdivided into smaller lots, each lot would have to be tested to determine its suitability for on-site sewage disposal.

After a public hearing, the Planning Board approved the plan, subject to the developer's complying with certain conditions. The Board then met in private to determine those conditions. After litigation about the Board's violating the Open Meeting Law, *J & C Homes, Inc.* v. *Planning Board of Groton*, 8 Mass. App. Ct. 123, 125 (1979), the case was remanded to the Board, and, in 1979, the assignor, at the Board's request, modified the drainage plan. It also, again at the Board's request, in 1980, modified the plan to include 29 lots, each with 40,000 or more square footage, in compliance with the zoning then in effect in Groton. Those changes were the only substantial amendments in the plan. (There was no change in proposed roadways or topography.)

From the time of the developer's submitting the preliminary plan in 1976 and May, 1980, when a definitive plan was disapproved by the Board, a corporate officer of the developer attended every meeting of the Board that dealt with the plan. At none of these meetings was the possibility of "ground water breakout" near two of the lots in a proposed street, or the need to adjust the finished grade of any lot discussed (these conditions easily curable by minor adjustments to the plan, namely,

by installing an interceptor drain and raising the elevation of the lot, respectively).

On May 22, 1980, the Board disapproved the plan for alleged "lack of information" and "topographic changes." On June 12, 1980, the assignor appealed the disapproval to Superior Court, and the case was transferred to the Land Court. In 1985, the Board hired an engineer, who, at the Land Court trial in 1988, for the first time made known to the developer concerns, two of which were (1) "frost heaves" and "ground water breakout" in the vicinity of two lots and (2) the finished elevation of one of the lots. The Board's engineer conceded at the trial that it would be possible to design an interceptor drain to eliminate the first of these concerns. Raising the elevation of one lot was also easily remediable.

The Land Court upheld the Board's objections on four grounds, two of which were the ones described above. The Land Court's rescript explicitly provided that the developer

> should be entitled to resubmit its most recent Definitive Plan following its compliance with the Board's valid requests. . . . Once . . . [the] plan conforms to such regulations, the Board . . . [should] proceed in accordance with G.L. c. 41, section 81U.

The developer appealed to the Appeals Court, which ruled in the Board's favor on the two grounds only: possible "ground water breakout" at lots 57 and 58 on a proposed street, and the finished elevation of one lot. In oral argument, a Justice of the Appeals Court asked counsel for the Board whether the Board would let the developer amend to meet these two concerns, and counsel answered in the affirmative. The Court's rescript explicitly provided:

> In accordance with G.L. c. 41, section 81U, the plaintiff may resubmit its most recent definitive plan

following its compliance with the board's [two] valid requests. . . .

The developer then amended its plan to meet these requests — it provided for an appropriate interceptor drain, and raised the elevation of the lot in question — and resubmitted the plan (the same plan it had submitted in 1976 and amended in 1979 and 1980 at the request of the Board). The Board disapproved it, because the plan did not conform to regulations and zoning by-laws adopted in 1980 and thereafter, including an increase in the minimum lot size from 40,000 square feet to 80,000 square feet.

The developer then appealed to the Land Court, and then to the Appeals Court, which, in substance held, based on a dictum in *Arenstam* v. *Planning Board of Tyngsborough*, 29 Mass. App. Ct. 314, 317 (1990), that "grandfather" protection was no longer available because the Board had in the 1988 litigation won on the two points ("ground water breakout" and finished elevation of one lot).

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

Whether the Appeals Court's disposition was incorrect, fundamentally unfair, and at odds with the language and legislative purpose in enacting "grandfathering" provisions, in applying the dictum in *Arenstam* v. *Planning Board of Tyngsborough*, 29 Mass. App. Ct. 314, 317 (1990), that grandfather protection is not applicable because the Board prevailed in the Land Court in 1989, on two points, (neither of which was made known to the plaintiffs until eight years after its 1980 plan was submitted)?

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

By statute, a plan amended to conform, so long as it is the same basic plan, is entitled to be judged by the rules, regulations and by-laws in effect when the plan was originally submitted, and is not to be held to after-adopted rules, regulations or by-laws. This "grandfather" protection derives from two statutes (manifesting a legislative concern for fundamental fairness to the developer).

One of these statutes, G.L. c. 40A, § 6 provides (in relevant part):

> If a definitive plan . . . is submitted to a planning board for approval . . ., the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law . . . in effect at the time of the first such submission which such plan . . . [is] being processed under the subdivision control law, and if such definitive plan or an amendment thereof is finally approved, for eight years from the date of endorsement of such approval.

Section six also provides that an appeal from a planning board's disapproval stays the applicability of any later-adopted zoning by-law.

The other statute from which "grandfather" protection derives, G.L. c. 41, § 81Q, provides for "grandfathering" until "final action has been taken . . . by . . . the board."

To say, as the Appeals Court did, that the developer is not entitled to "grandfather" protection provided by G.L. c. 40A, § 6 and G.L. c. 41, § 81Q, because the developer lost in the Land Court on "ground water breakout" and finished elevation of one lot ignores what happened here. The developer would

unquestionably have won on these points if the Board had timely told it about them.

G.L. c. 41, § 81U requires a planning board disapproving a definitive subdivision plan "state in detail wherein the plan does not conform to the rules and regulations of the planning board. . . ." Nowhere in the Board's letter of disapproval was any detail provided wherein the plan failed to conform. The letter simply states that the plan "does not provide adequate information to determine proper drainage, suitability of [the] land for Board of Health review." The Board of Health had, of course, already stated that the tract was suitable for subsurface drainage (although if subdivided into smaller lots, each would have to be tested. *See Fairbairn* v. *Planning Board of Barnstable*, 5 Mass. App. Ct. 171 (1977).)

Instead of stating in detail its reasons for disapproving the plan, the Board hired an engineer in 1985 to cast about for faults in the plan. The engineer found ten of them (eight of which did not survive litigation). But the two on which the Board prevailed in litigation were not made known to the developer until the engineer testified at the Land Court trial in 1988. The 1980 plan provided sufficiently detailed information for the Board, after having hired in 1985 an engineer to find fault with the plan, to do so in detail in 1988, including information that enabled the engineer to specify objections to "ground water breakout" in the proposed street (at lots 57 and 58) and the finished elevation of a specific lot. If the plan provided information adequate to make these objections in 1988, it provided information adequate for the Board to have stated them (and its other eight reasons on which it did not prevail in litigation) in 1980, when the plan was reviewed and disapproved.

If the Board had stated its objections in detail at any time between 1980 and 1988, the plan could easily have been amended to conform to the Board's objections. In short, the

developer is being held to objections the Board did not inform it of for eight years after it submitted the 1980 plan, and because the Board prevailed on them (as, of course, it would, because the Board had not told the developer about them).

The Board did disapprove the plan despite the earlier Land Court and Appeals Court rescripts that specified that the developer was entitled to "resubmit" its definitive plan to comply with the Board's objections and, that done, "the Board . . . proceed in accordance with [G.L. c. 41, § 81U]" (*i.e.*, revocation of disapproval and approval), and despite the assurance by the Board's counsel in oral argument before the Appeals Court that that would be done.

The Appeals Court's extension of the dictum in *Arenstam* v. *Planning Board of Tyngsborough*, 29 Mass. App. Ct. 314, 317 (1990), that because the developer's 1980 definitive plan was not "finally approved" it is not entitled to "grandfather" protection, is totally inappropriate. First, *Arenstam* is factually dissimilar. The developer there conceded that his plan did not conform; he filed a definitive subdivision plan exactly seven months after submitting a preliminary plan, leaving himself no time to negotiate with the planning board and to file an amended plan; and in that seven-month interim the town had made changes in its zoning. The Appeals Court held that the developer was not entitled to "grandfather" protection "in these circumstances."

Second, the Appeals Court's decision ignores why the developer's 1980 plan here was not approved. It was not approved because the developer had no chance to have it approved, since the Board did not state its objections to it for eight years after it was submitted and after the disapproval for "lack of information."

Third, the Appeals Court's decision also ignores the intent and purpose of the "grandfather" protection and of the subdivision control law itself, which is to provide a method whereby

the interests of municipalities and developers may be accommodated. The subdivision control laws "manifest a legislative intent to maximize the dialogue between board and developer and thus to ensure the developer's right to approval of plans which are brought into compliance with the statutory and regulatory requirements applicable to the locus," *North Landers* v. *Planning Board of Falmouth*, 382 Mass. 432, 445 (1981), and envisions the "working out of difficulties and solutions less rigid than the zoning process." *Meyers* v. *Planning Board of Westport*, 29 Mass. App. Ct. 167, 170 (1990). G.L. c. 41, § 81U itself contemplates that "adjustments" may be made to the definitive plan. In effect, both *North Landers* and *Meyers* envision, not a competition between planning board and developer, but a cooperative effort, a dialogue, to achieve approval of a plan complying with applicable rules, regulations and by-laws.

Here, however, the developer, intent on complying, was kept from complying because it kept ignorant of what were the objections of a board implacably opposed to the plan. If the dictum in *Arenstam* is extended to what happened here, then a municipality may avoid "grandfathering" altogether simply by denying approval for "lack of information" (regardless of whether that is so or, as here, not so), not disclosing its objections, and prevailing on any after-disclosed objection.

Furthermore, the Appeals Court's decision confuses the types of stays in paragraphs seven and eight of G.L. c. 40A, § 6. At page three, line 7 of its slip opinion, the Court paraphrases the language of G.L. c. 40A, § 6, paragraph 8: "final adjudication . . . is in favor of the owner of said lot. . . ." But paragraph eight deals with lots shown on a plan which a planning board has already approved, but litigation is initiated concerning one or more lots shown thereon. That was not the situation here. The 1979 modification related to the subsurface drainage system for the entire tract. The developer was and is

not seeking to come within the exemptive provision of paragraph eight, but within the exemptive provision of paragraph seven, which protects against later-adopted zoning changes pending an order or decree of a court of final jurisdiction. And here, both the Land Court and the Appeals Court recognized in their rescripts the developer's rights, and required further processing under G.L. c. 41, § 81U (revocation of disapproval and approval) once the amendments to the plan were made following detailed identification of the "problems" revealed in 1988.

This case is worthy of further appellate review because the Appeals Court's decision extending the dictum in *Arenstam* (opens the door to municipalities' avoiding the "grandfathering" protections accorded developers by statute, (2) is fundamentally unfair to the developer, and (3) raises important social issues, since, by providing a way around the "grandfathering" protections, it enables municipalities retroactively to apply "large-lot" zoning requirements (sometimes referred to as "snob zoning.")

Respectfully submitted,

Dunstable-Groton Corp.
By its attorneys,

/s/_____

James P. Mitchell
BBO #349720
20 West Emerson Street
Melrose, MA 02176
(617) 662-9195

/s/_____

Eugene L. Tougas
BBO #500680
P.O. Box 586
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APPENDIX B.

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Eugene L. Tougas, Esquire
P.O. Box 586
Waltham, MA 02154

RE: Docket No. FAR-08157

DUNSTABLE-GROTON CORPORATION
v.
PLANNING BOARD OF GROTON

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on November 28, 1995, the above-captioned Application for Further Appellate Review was denied.

/s/_____
Jean M. Kennett, Clerk

Dated: November 29, 1995

To: James P. Mitchell, Esquire
Eugene L. Tougas, Esquire
Eric W. Wodlinger, Esquire

APPENDIX C.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 95-P-78

DUNSTABLE-GROTON CORPORATION,[1]

v.

PLANNING BOARD OF GROTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, owner of a parcel of land in Groton, appeals from the Land Court judge's entry of summary judgment affirming the Groton planning board's denial of approval of the plaintiff's modified definitive subdivision plan submitted on July 30, 1993. The planning board's denial was based on the plan's noncompliance with certain Groton zoning by-laws and subdivision regulations in effect in 1993, which had been amended significantly since the plaintiff first submitted its plan in 1976. We affirm.

The undisputed facts are taken from the Land Court's summary judgment order, augmented by the plaintiff's complaint. On July 22, 1976, the plaintiff's assignor submitted a preliminary subdivision plan for a parcel located on Old Dunstable Road to the Groton planning board. Approval was denied. The assignor then submitted a definitive plan on December 22, 1976, and, after certain court proceedings,[2] submitted modified

[1] Assignee of J & C Homes, Inc. Dunstable-Groton Corporation was substituted as the named plaintiff in this action on January 21, 1994.

[2] *J & C Homes, Inc. v. Planning Bd. of Groton*, 8 Mass. App. Ct. 123 (1979).

versions of the plan on November 27, 1979, and March 27, 1980. The last plan was denied approval for failure to comply with ten provisions of the Groton subdivision rules and regulations. On January 13, 1989, the Land Court upheld the planning board's denial on four of the ten grounds. By memorandum and order pursuant to Rule 1:28, dated May 4, 1993, the Court affirmed the Land Court's judgment on two of those four bases.[3]

As provided in this Court's May 4, 1993, order, the plaintiff submitted another modified plan to the planning board on July 30, 1993. That plan was denied approval for failure to comply with the Groton zoning by-laws and subdivision regulations, as they had been amended since the initial submission of the plan in 1976. Of particular concern to the plaintiff is the area requirement for lots situated in residential districts, which was increased in May, 1980, from 40,000 square feet to 80,000 square feet.

The plaintiff maintains that its July 30, 1993, subdivision plan should be governed by the zoning by-laws and subdivision regulations that were in effect in 1976. The plaintiff's principal argument is that its original 1976 subdivision plan implicated the zoning stay of G.L. c. 40A, § 6, for all subsequent modifications of the plan. Section 6 provides that when an appeal is taken under G.L. c. 41, § 81BB, from the planning board's denial of approval of a subdivision plan, the applicability of zoning regulations enacted subsequent to the submission of the plan is stayed. However, § 6 also provides that the stay continues in effect until final disposition, but only if final adjudication is in favor of the owner of the lots at issue.

The Land Court judge correctly reasoned that once this Court affirmed the Land Court's January 13, 1989, judgment upholding the planning board's denial of approval of the plaintiff's 1980 plan, the stay provided by G.L. c. 40A, § 6, was no longer

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[3] *J & C Homes, Inc.* v. *Planning Bd. of Groton*, 34 Mass. App. Ct. 1119 (1993).

available. Here, final adjudication did not lead to a determination that the plaintiff's subdivision plan should have been approved. *See Samson* v. *San-Land Dev. Corp.*, 17 Mass. App. Ct. 977, 979 (1984); *Arenstam* v. *Planning Bd. of Tyngsborough*, 29 Mass. App. Ct. 314, 317 (1990). It is of no moment that the planning board's denial of approval was upheld on fewer than all of its original grounds. *See Mac-Rich Realty Constr., Inc.* v. *Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 81 (1976); *Fairbairn* v. *Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1979).

The plaintiff's contention that the various subdivision plans which it submitted to the planning board since 1976 were modifications of the original plan does not change the result in this case. *Arenstam* v. *Planning Bd. of Tyngsborough*, 29 Mass. App. Ct. at 317, specifically instructs that the stay protection conferred in G.L. c. 40A, § 6, to "a definitive plan or amendment thereof [which] is finally approved," refers only to an amended plan filed within seven months of a preliminary plan. Consequently, the plaintiff's subsequent modified plans, submitted several years after the 1976 plan, are to be treated as new plans under G.L. c. 40A, § 6, and gain stay protection only from the date each plan was submitted to the planning board. *See Arenstam* v. *Planning Bd. of Tyngsborough*, 29 Mass. App. Ct. at 317, quoting *Green* v. *Board of Appeal of Norwood*, 358 Mass. 253, 257 n.4 (1970).

Nothing in this Court's May 4, 1993, order pursuant to Rule 1:28 contravenes the applicability of the Groton zoning by-laws and subdivision regulations in effect in 1993 to the plaintiff's July 30, 1993, subdivision plan. Accordingly, the entry of summary judgment for the defendant was appropriate as a matter of law.

Judgment affirmed.

By the Court (Brown, Porada & Flannery, JJ.),

/s/_____
Nancy Turck Foley
Clerk

Entered: October 10, 1995.

APPENDIX D.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, October 10, 1995

IN THE CASE OF

DUNSTABLE-GROTON CORPORATION

v.

PLANNING BOARD OF GROTON.

pending in the Land Court for the County of

ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed.

BY THE COURT,

/s/_____, Clerk.
Nancy Turck Foley

October 10, 1995

and Dunstable-Groton Corporation's representatives so appeared.

23. When such representatives appeared, the Board, through its Chair, immediately informed said representatives, purportedly upon written advice of Counsel in a communication to be privileged, that the Board would consider the plan only if there was compliance with procedures and specifications set forth in amendments to the rules and regulations governing subdivisions of land in Groton and with provisions of amendments to the Zoning By-laws of the Town of Groton adopted at various dates after the original submission on December 22, 1976.

24. Following such statement, the Board, on motion made and seconded, supported the statement and voted accordingly.

25. Members Perkins and Powell were absent and did not vote.

26. Notwithstanding the stated position of the Planning Board set forth in paragraphs 23 and 24, I received notice that the Board called for and set up a public hearing concerning Dunstable-Groton's plan for September 23, 1993, and I attended the hearing.

27. Meanwhile, the Board referred the plan to a new (*i.e.*, third) engineering consultant whose representatives delivered a report to the Board at the hearing.

28. Without discussion of any details thereof by the Board, except the fact that "new" rules and zoning were the standards used and not the "old", the engineering report was adopted by the Board as its own and the Board voted to meet on September 27, 1993, at which to formally vote a disapproval of the plan after Board counsel should have reviewed and approved the form and content of the vote.

29. At the public hearing held September 23, 1993, the Planning Board demonstrated its procedure by adopting the findings of its consultant prior to the above vote without afford-

I find the following facts to be pertinent and undisputed:

1. Plaintiff Dunstable-Groton Corporation ("Plaintiff"), as the assignee of J & C Homes, Inc. ("J & C Homes"), owns a certain parcel of land located off Old Dunstable Road, Groton, MA ("Locus"). By assented to motion allowed by this Court on January 21, 1994, Plaintiff was substituted as the named plaintiff in this action.

2. Plaintiff proposed to subdivide Locus into 29 lots, as shown on a definitive subdivision plan entitled "Coachman's Estates II" prepared by Amherst Survey Associates, Inc. ("the Plan"), dated November, 1976, modified November 27, 1976, March 27, 1980 and July 24, 1993.

3. On or about July 22, 1976, J & C Homes Submitted a preliminary subdivision plan for Locus to the Board, which plan was denied approval by the Board on September 22, 1976.

4. On or about December 22, 1976, J & C Homes submitted the Plan as modified on November 27, 1976 to the Board. Subsequently, after certain legal proceedings,[1] J & C Homes submitted the Plan as modified on March 27, 1980 to the Board for consideration.

5. By a decision dated May 22, 1980, the Board denied approval of the March 27, 1980 modified Plan for failure to comply with ten provisions of the Groton Subdivision Rules and Regulations ("the Rules and Regulations"). Said May 22, 1980 decision was appealed pursuant to G.L. c. 41, § 81BB to the Middlesex County Superior Court. The case was subsequently transferred to this Court.

6. By Decision and Judgment dated January 13, 1989, this Court upheld the Board's May 22, 1980 decision, finding that the March 27, 1980 modified Plan did in fact fail to comply with four of the ten provisions of the Rules and Regulations cited by the Board. *See, J & C Homes, Inc.* v. *Planning Board*

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[1] *See, J & C Homes, Inc.* v. *Planning Board of Groton*, 8 Mass. App. Ct. 123 (1979).

of Groton, Land Ct. Misc. No. 123523 (January 13, 1989). J & C Homes appealed said January 13, 1989 Decision and Judgment to the Appeals Court.

7. By Memorandum and Order Pursuant to Rule 1:28 dated May 4, 1993, the Appeals Court upheld this Court's January 13, 1989 Decision and Judgment with respect to two of the four provisions of the Rules and Regulations at issue. *See, J & C Homes, Inc.* v. *Planning Board of Groton*, 34 Mass. App. Ct. 1119 (1993).

8. On or about July 30, 1993, Plaintiff, having modified the Plan so as to comply with the findings of this Court and the Appeals Court, submitted said Plan as modified on July 24, 1993 to the Board.

9. The July 24, 1993 modified Plan does not comply with the current Rules and Regulations, which have been amended numerous times between 1976 and 1993. Rather, said Plan complies with the Rules and Regulations as they were in effect in 1976.

10. By decision dated September 27, 1993, the Board denied approval of the July 24, 1993 modified Plan on the ground that said Plan failed to comply with the current 1993 Rules and Regulations. Plaintiff has timely appealed said September 27, 1993 decision pursuant to G.L. c. 41, § 81BB.

The sole issue to be decided herein is whether the July 24, 1993 modified Plan is entitled to "grandfather" protection pursuant to G.L. c. 40A, § 6, 5th paragraph.

Having reviewed the evidence presented, I find that the Board acted properly in disapproving the July 24, 1993 modified Plan. Plaintiff is not entitled to the grandfather protection provided for under G.L. c. 40A, § 6, 5th paragraph. Only disapproved plans that are subsequently determined upon appeal pursuant to G.L. c. 41, § 81BB to be, in fact, entitled to approval, have grandfather protection. *Arenstam* v. *Planning Board of Tyngsborough*, 29 Mass. App. Ct. 314, 317 (1990).

Disapproved plans that are found to be properly denied approval are not entitled to grandfather protection. Thus, inasmuch as the May 22, 1980 decision of the Board denying approval of the July 24, 1993 modified Plan was upheld by this Court and the Appeals Court, I find that said Plan is not entitled to grandfather protection under G.L. c. 40A, § 6, 5th paragraph.

Based upon the foregoing, the September 27, 1993 decision of the Board is hereby affirmed. Plaintiff's Motion for Summary Judgment is denied and summary judgment is hereby granted in favor of the Board.

By the Court. (Cauchon, C.J.)

Attest:

/s/_____

Charles W. Trombly, Jr.
Recorder

October 21, 1994

APPENDIX F.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

J & C HOMES, INC.,[1]

v.

PLANNING BOARD OF GROTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal arises out of the plaintiff's efforts to obtain the necessary approval from the defendant, the Planning Board of Groton (the board), of a definitive subdivision plan of an undeveloped tract of land owned by the plaintiff, J & C Homes, Inc. In its decision denying approval of the plan, the board noted that the proposed subdivision failed to meet the requirements of ten of its rules and regulations relating to subdivisions. The Land Court upheld the action of the board under four of the regulations, two of which relate to drainage and two of which relate to topography. The plaintiff appeals, claiming that (1) it provided sufficient information to address the board's concern about drainage of water from the subdivision and that, even if it did not, the board should have approved the plan on condition that perimeter drains be installed; (2) the two regulations pertaining to topography on which the board's decision was based are illegally vague; and (3) the judge erred in including two other sections in his judgment.

The facts. The trial judge made the following findings of fact which we do not disturb unless clearly erroneous. *Batchelder* v. *Planning Bd. of Yarmouth*, 31 Mass. App. Ct. 104, 106 (1991). On December 22, 1976, the plaintiff submitted to

[1] By motion filed and allowed on January 21, 1988, the plaintiff's purported to substitute Dunstable-Groton Corporation as the party plaintiff (*see* A. 46), but the new plaintiff's name was never used. (*See, e.g.*, A. 57, 151).

the board its original plan to subdivide a tract containing approximately forty acres of land in Groton into three parcels. (A. 59).[2] The board reviewed the plans in accordance with the Groton subdivision rules and regulations. (Ex. 1-13). A copy of the plan was also filed with the Groton board of health. (A. 60). On March 15, 1977, the board of health reported to the planning board that the parcels were suitable for subsurface sewage disposal. Thereafter, the board approved the plaintiff's application, subject to its compliance with certain conditions which were imposed by the board at a later date. The plaintiff appealed from that decision pursuant to G.L. c. 41, § 81BB.

On July 17, 1979, this court held that the board's "conditional approval" of the plaintiff's application was insufficient under the Open Meeting Law, G.L. c. 39, § 23B, because the board subsequently met at a private session to determine those conditions which were imposed on the plaintiff. The matter was remanded to the board for reconsideration of the plaintiff's application. *J. & C. Homes, Inc.* v. *Planning Bd. of Groton*, 8 Mass. App. Ct. 123, 125 (1979). In response to recommendations by the board, the plaintiff submitted a modified plan on November 29, 1979, transforming the subdivision into twenty-nine lots. (Tr. 102-03). A final modified plan, which is the subject of this appeal, was submitted on May 7, 1980. On May 22, 1980, the board denied the plaintiff's application for subdivision approval, citing the plan's failure to comply with ten regulations relating to matters of subsurface sewage disposal, grading, and topography. (A. 62-63).

On June 12, 1980, the plaintiff appealed the disapproval to the Superior Court. The case was transferred to the Land Court, and a trial was held. (A. 5). After hearing oral and documentary evidence and taking a view, the Land Court judge upheld the board's decision, finding that the board acted properly with re-

[2] References to the record are as follows: Appendix (A.); Transcript (Tr.); Exhibits (Ex.).

gard to four of the ten provisions on which its decision was based.[3] (A. 59-71). With regard to the other provisions, the judge found that the board exceeded its authority as to the alleged failure of the plaintiff to comply with three of the regulations. He found two other provisions were "too vague and general to sufficiently inform the [plaintiff] about the standards which [it] must meet" in order to satisfy the regulations. (A. 67-68). A sixth regulation on which the board's denial was based was declared invalid and "wholly unrelated to protecting the safety, convenience, and welfare of the Town's inhabitants," and therefore beyond the purview of G.L. c. 42, § 81M.[4] (A. 69).

Describing the tract of land in question, the judge wrote that it is "comprised of irregular and steep hills, as well as ridges and

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[3] The four provisions which the judge found to be reasonable bases for the board's decision are as follows:

> 1. *Section V-A-1*. Soil and Drainage. "No land shall be subdivided for residential use if, after adequate investigation, the Board of Health determines that it cannot be used for building purposes without danger to health or safety. The Planning Board may, in particular instances, require satisfactory evidence that soil conditions and natural drainage are suitable for the proposed subdivision from the point of view of sanitation and public health."
>
> 2. *Section IV-B-2-1*. "The Definitive Plan shall contain . . . (proposed storm drainage of land, including existing natural waterways and the proposed disposition of water from the proposed subdivision to adequate natural drainage channels or artificial means of disposal thereof."
>
> 3. *Section V-A-2*. "Due regard shall be shown for all natural features, such as large trees, watercourses, boulders or rock outcrops, as well as for scenic points, historic spots, and similar community assets, which, if preserved, will add attractiveness and value to the property."
>
> 4. *Section V-C-1-a*. "All streets in the subdivision shall be designed so that, in the opinion of the Board, they will provide safe vehicular travel and natural drainage with no drainage pockets, and so that they are adjusted to the topography and provide the minimum number of intersections with major streets."

[4] We need not review the judge's findings with regard to these regulations as they are not before us on appeal.

deep gullies. It is not situated within a sewered area nor is it near a public water supply. Accordingly, development of the locus as proposed will require extensive excavation and the construction of individual wells and subsurface sewage disposal systems to service the lots within the subdivision." (A. 60).

At trial, the plaintiff's expert, Bruce Stamski, testified that he performed a drainage study which included thirteen test borings done on the site 200-300 feet apart from one another. (Tr. 110-11). Stamski concluded that the drainage system of the land essentially complied with the drainage requirements of the board. (Tr. 73-76; 82).

The board's expert, Robert F. Daylor, testified that, with respect to drainage, the borings done by the plaintiff's expert showed at least two areas of the subdivision where excavation would reach below the existing ground water elevation. (Tr. 187-88, 241). In particular, the result of a B11 boring test performed by the plaintiff's expert indicated a strong likelihood of "a drainage or ground water divide." (Tr. 194-95). The board's expert also testified that boring B3 showed a water table elevation fourteen feet above the proposed finished grade of a nearby road. (Tr. 241). Excavating below the existing ground water elevation would lead to a problem with ground water breakout and to problems with roads freezing and thawing and icing conditions. (Tr. 197-203).

With respect to topography, the board introduced evidence of the plan's proposed excavation and its effect on the natural features and topography of the sites. (Ex. 55-56, 61-62, 84-85).

Discussion. A party appealing from a decision of the planning board pursuant to G.L. c. 41, § 81BB, bears the burden of proving to the trier of fact that such decision was improper and beyond the scope of the board's authority. *Mac-Rich Realty Constr., Inc.* v. *Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 83 (1976). *Fairbairn* v. *Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 173 (1977). *Strand* v. *Planning Bd. of*

Sudbury, 7 Mass. App. Ct. 935, 936 (1979). The trial judge must "conduct a hearing *de novo*, find facts, and determine the validity of the planning board's decision." *Mac-Rich, supra* at 81. If the judge finds that any one of the substantial reasons given by the board for its denial of subdivision approval was proper, the board's action must be affirmed. *Mac-Rich, supra* at 80-81. *See also Fairbairn*, 5 Mass. App. Ct. at 179. In order to offer guidance to the parties and to avoid prolonged litigation, however, we address each of the board's reasons for denying the subdivision plan which the plaintiff raises on appeal. *See Mac-Rich, supra* at 81.

1. *Soil and drainage considerations under sections V-A-1 and IV-B-2-1.* With the plan's proposed "drastic alterations in the site's natural topography," the judge found that the plan failed to provide sufficient information regarding the potential for ground water breakout after development. There was evidence that the proposed removal of earth and cuts as deep as thirty feet would result in a post-excavation grade below the existing ground water elevation in at least two areas of the site. (Tr. 192, 241; Ex. 37, 76-77). The board's expert testified that excavation below the water table would result in constant ground water breakout. This, in turn, could cause a persistent flow after the proposed grading that would interfere with construction, and, if water froze and thawed under the roadbed, it would cause frost heaves in the road. (Tr. 202-07). The plaintiff incorrectly claims that the board's expert in essence agreed with his own expert's testimony that there was adequate drainage. The credibility of the witnesses was for the judge to assess.[5] *Astravas* v. *Petronis*, 361 Mass. 366, 367 (1972). The judge found that there was "scant information provided as to the serious problem of post-development ground water breakout." (A. 64). Consequently, the judge concluded that "the

[5] In fact, at trial, the judge seemed to indicate that he was not persuaded by the opinion of the plaintiff's expert. (Tr. 77-78).

[b]oard did not exceed its given authority" in disapproving of the plan due to its noncompliance with section V-A-1 of the regulations. (A. 65). This finding was not clearly erroneous.

The plaintiff also contends its failure to comply with section V-A-1 cannot be a basis for denying its plan because the regulation relates to drainage issues, which are within the exclusive jurisdiction of the board of health. This argument is misguided. While it is true that decisions as to the adequacy of on-site sewage facilities are the responsibility of the board of health, *see Fairbairn*, 5 Mass. App. Ct. at 176, planning boards have the authority to demand information reasonably necessary to evaluate the subdivision plan, including information relating to sanitary and storm sewer systems. *Loring Hills Developers Trust* v. *Planning Bd. of Salem*, 374 Mass. 343, 351 (1978). The board's disapproval was based on the plaintiff's failure to provide adequate information in accordance with § V-A-1. (A. 55).

The plaintiff further avers that the board's authority under section V-A-1 of the regulations is limited to soil and drainage problems that affect public health and that the problem of frost heaves, as suggested by the board's expert, involves construction only and poses no risk of danger to health or safety. The board's expert witness testified to the contrary. After the regrading, he opined, a number of the lots would lack the requisite distance between the finished grade of the land and the ground water elevation which would raise sanitary and public health concerns. (Tr. 185-88). Given this testimony, there was no error.

The judge also found that the plan failed to comply with section IV-B-2-1 of the regulations because it failed to provide sufficient information relative to "the prevention of any adverse impact from the proposed storm drainage system on property situated outside the subdivision's boundaries." (A. 65). The plaintiff argues that testimony from his expert indicated that the

proposed drainage system was adequate for the carrying of the runoff from storms. This conclusion was in part disputed, however, by the board's expert who testified that drainage from lots 57-58 could result in ground water breakout that would lead to a constant flow of water rising up and running over the subdivision road and into the roadways. (Tr. 196-99). There was no evidence that the drainage of the run-off would not affect abutting property. The findings of the judge were supported by the evidence and were not clearly erroneous.[6]

2. *Natural features and topography under sections V-A-2 and V-C-1-a.* The trial judge found that the proposed subdivision "gives little, if any, regard to the natural features and topography of the locus." (A. 70). The extensive excavation required demonstrated "a total disregard for the natural features of the site in direct contravention of section V-A-2. . . ." The evidence at trial supports the judge's findings. The proposed subdivision entails excavations of up to thirty feet, the removal of approximately 482,000 cubic yards of sand and gravel, and the removal of all trees on the forty-acre site. (Tr. 34-35, 141-42, 184; Ex. 57-58).

The plaintiff does not dispute this finding but rather contends that sections V-A-2 and V-C-1-a are illegally vague. In particular, the plaintiff points to the language of § V-A-2 which states: "Due regard shall be shown for all natural features . . . which, if preserved, will add attractiveness and value to the property." He also cites § V-C-1-a's requirement that streets be "designed . . . so that they are adjusted to the topography" as being vague.

In considering whether a subdivision regulation is illegally vague, the critical inquiry is whether the challenged regulation

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[6] The plaintiff contends that, even if the plan would raise a drainage problem, this problem could be remedied by installing interceptor drains and by requiring sufficient gravel under the roadbed to permit the flow to drain. (Plaintiff's Brief, at 12-13.) There is no evidence that the plan submitted to the board included interceptor drains or any solution to the ground water breakout problem. As the judge indicated, however, the plaintiff is free to resubmit its plan with such a proposed solution which would comply with the board's regulations.

is "sufficiently definite to apprise developers 'in advance what is or may be required of them and what standards and procedures will be applied to them. . . .'" *Fairbairn*, 5 Mass. App. Ct. at 174, quoting from *Castle Estates, Inc.* v. *Park & Planning Bd. of Medfield*, 344 Mass. 329, 334 (1962); *Chira* v. *Planning Bd. of Tisbury*, 3 Mass. App. Ct. 433, 438 (1975). A regulation which is devoid of standards "lends itself too readily to subjective application or disapproval of plans 'merely because the board feels general public considerations make such action desirable.'" *North Landers Corp.* v. *Planning Bd. of Falmouth*, 9 Mass. App. Ct. 193, 196 (1980), *S.C.*, 382 Mass. 432 (1981), quoting from *Pieper* v. *Planning Bd. of Southborough*, 340 Mass. 157, 163-64 (1959).

(a) Section V-A-2. This section contains much of the same language as one of the provisions at issue in *Chira*, which the court found to be unduly vague.[7] In that case, we said: "[W]hether the preservation of a particular natural feature 'will add attractiveness and value to the subdivision,' and what constitutes . . . 'due regard,' are essentially matters of opinion — presumably the collective opinion of the members of the planning board at the time a particular plan is being evaluated." *Chira*, 3 Mass. App. Ct. at 438. Section V-A-1, which uses substantially the same language as in the regulation in *Chira*, fails to formulate clear and objective standards sufficiently definite to apprise owners in advance what is or may be required of them. Consequently, it is invalid under G.L. c. 41, § 81Q, and it cannot serve as a basis for disapproving the plan. *Canter* v. *Planning Bd. of Westborough*, 7 Mass. App. Ct. 805, 811 (1979).[8]

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[7] That provision stated: "Due regard shall be shown for all natural features, such as large trees, water courses, scenic points, historic spots, and similar community assets, which, if preserved, will add attractiveness and value to the subdivision." *Chira*, 3 Mass. App. Ct. at 438.

[8] We reject the judge's reasoning that the plaintiff failed to comply with this regulation because it failed to submit information as to the retention of "natural features" on the site. Section V-A-2 is a facial requirement for preserving natural features and does not involve the submission of information, data, or evidence.

(b) Section V-C-1-a. The plaintiff claims that the requirement of § V-C-1-a that streets in the subdivision be "adjusted to the topography" is similarly vague. The term "adjustment," the plaintiff claims, "has a wide margin of uncertainty." Plaintiff's Brief, at 16. Furthermore, the plaintiff claims, the term "topography" could mean existing or proposed topography; the plaintiff urges that it should be interpreted to mean "proposed topography."

Words in legislative enactments "are to be construed according to their natural and ordinary meaning." *Chatham Corp.* v. *State Tax Commn.*, 362 Mass. 216, 219 (1972). *See also Commonwealth* v. *One 1987 Mercury Cougar Auto.*, 413 Mass. 534, 537 (1992). To determine whether language alleged to be indefinite renders a regulation vague, "one must take into account not only the words themselves, but the entire context of the regulation attempted." *North Landers Corp.* v. *Planning Bd. of Falmouth*, 382 Mass. at 440.

We conclude that the phrase "adjusted to the topography" is "not so rubbery or indefinite a term as to elude common understanding." *North Landers Corp.*, 382 Mass. at 442. The ordinary meaning of the term "adjusted" is "accommodated, altered, or revised to suit a particular set of circumstances or requirements." Webster's Third New Int'l Dictionary 27 (3d ed. 1971). This common interpretation of the word is "well within the comprehension of planning boards and landowners." *North Landers Corp.*, 382 Mass. at 441. We agree with the plaintiff, however, that the word "topography" in § V-C-1-a encompasses the proposed, not the existing, topography to which the subdivision plan should conform. Assuming the plaintiff is able to show that the proposed typography satisfies the drainage requirements discussed *supra*, § V-C-1-a requires that there be an additional showing that the proposed streets are safe in that they have no drainage pockets, are adjusted to the proposed typography (*e.g.*, the streets are not too steep), and avoid unnecessary intersections with major streets.

3. *Inclusion of sections IV-B-2-n and IV-B-4 in the judgment.* Finally, the plaintiff argues that the inclusion of §§ IV-B-2-n and IV-B-4 as among those with which the plan did not comply was error. We agree with the plaintiff that this appears to be an oversight of the judge, since the text of the memorandum of decision concluded that "[t]he Board . . . acted improperly in basing its denial . . . on J & C's noncompliance with section . . . IV-B-2-n." (A. 68). The judge's inclusion of § IV-B-4 as among those with which the plaintiff failed to comply was a similar oversight, since the text of his decision concluded that § IV-B-4 "runs afoul of the general purpose for which the Subdivision Control Law was enacted." (A. 69). We note that the board makes no argument to the contrary on this issue. Since the text of the ultimate decision of the judge is inconsistent with his subsidiary findings, a judgment consistent with the text of the decision will be entered. *See Simon* v. *Weymouth Agric. & Indus. Socy.*, 389 Mass. 146, 151-52 (1983).

Conclusion. Accordingly, the judgment is modified by striking all references to §§ IV-B-2-n, IV-B-4, and V-A-2 of the subdivision regulations. As so modified, the judgment is affirmed. In accordance with G.L. c. 41, § 81U, the plaintiff may resubmit its most recent definitive plan following its compliance with the board's valid requests under subdivision regulations.

So ordered.

By the Court (Fine, Jacobs & Ireland, JJ.),

/s/_____
Clerk

Entered: May 4, 1993.

APPENDIX G.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

LAND COURT DEPARTMENT
MISC. CASE NO. 199162

Dunstable-Groton Corporation,
Assignee of J & C Homes, Inc.
Plaintiff

v.

AFFIDAVIT OF
CHARLES P. MAGRI

Planning Board of Groton
Defendant

Charles P. Magri, being first duly sworn, deposes and says, of his own knowledge, as follows:

1. I am a resident of Westwood, Massachusetts, at 101 Sycamore Drive.

2. At any relevant time prior to April 26, 1988, I was Treasurer of J & C Homes, Inc.

3. Dunstable-Groton Corporation is an existing corporation organized under the laws of the Commonwealth of Massachusetts on March 20, 1980, and is in good standing per records of the Secretary of State for the Commonwealth of Massachusetts, all as is attested by the Secretary in his certificate dated December 9, 1993, and a copy is appended hereto marked "A".

4. I am now and have been since its incorporation President of Dunstable-Groton Corporation.

5. The principal office of the corporation is at 100 Sycamore Drive, Westwood, Massachusetts, where my residence is located, to which the defendant Planning Board, through a person in charge of the Board's day-to-day affairs, has addressed mail to said corporation at various times between July 23, 1993, and October 13, 1993.

6. Dunstable-Groton Corporation is the owner of a parcel of land situated off Old Dunstable Road, Groton, Massachusetts, per Certificate of Title No. 160505 in the office of the Assistant Recorder of the Land Court, Middlesex South Registry District, and a copy of a true copy thereof, as attested to by the said Assistant Recorder of the Land Court on December 8, 1993, is appended hereto marked "B".

7. Since the date of said Certificate of Title (*i.e.*, April 9, 1980), lots 11 and 12 included therein have been conveyed out and the Certificate has been cancelled as to said lots.

8. Since 1975 and at all relevant times since, the Groton phase of the business of J & C Homes, Inc. and then of Dunstable-Groton Corporation has been my charge and all matters concerning same have been conducted either by me or under my supervision and with my participation.

9. The land shown on the definitive plan submitted by J & C Homes, Inc. to the Planning Board on December 22, 1976, is that now owned by Dunstable-Groton Corporation per said Certificate of Title No. 160505.

10. Notice of the submission of the plan referred to above was given to the Clerk of the Town of Groton by me on December 22, 1976.

11. When such notice was delivered to the Clerk of the Town, I received an acknowledgement of such delivery and a copy of said notice and receipt are appended hereto marked "C".

12. Beginning in 1976 and at all relevant times and places thereafter, I participated in the processing for approval of the definitive plan entitled "Coachman's Estates II" by the Planning Board of Groton and attended every meeting of the Planning Board held concerning the preliminary plans and the definitive plan as modified prior to May 23, 1980.

13. I was one of the addressees of the letter of disapproval from the Planning Board of Groton dated May 23, 1980, a copy of which is annexed hereto marked "D".

14. I was one of the addressees of the letter dated October 12, 1979, from the Planning Board referred to in the above letter dated May 23, 1980, and a copy thereof is annexed hereto marked "E".

15. The subject matter of "post-development ground water breakout" in the vicinity of lots 57 and 58 in the proposed way named "Prince Charles Drive" never came up and was never mentioned by or on behalf of any member of the Planning Board or its consultant whether orally or in writing prior to 1988, and neither was the subject matter of a need to adjust the proposed finished grade of any lot in order to comply with any regulation of the Board of Health of Groton.

16. On or about March 16, 1977, I received from the Board of Health of Groton a copy of a letter dated March 15, 1977, addressed on behalf of the Board of Health to the Planning Board of Groton reading as follows:

"This letter is an endorsement of the letter of December 20, 1976, from Gerald J. Collins, Chief Sanitation Officer at Nashoba Associated Boards of Health, concerning the subdivision known as "Coachman Estates." This property consists of three (3) lots, numbered 31, 32 and 33 and with respective areas of 4, 5, and 27 acres.

"As stated in Mr. Collins' letter, the lots as descibed are adequate for subsurface sewage disposal. However, if the land is to be further subdivided into smaller parcels the Groton Board of Health and its agent, Nashoba Associated Boards of Health, would require testing on each individual lot to determine its suitability for on-site sewage disposal."

16A. A copy of said letter of March 16, 1977, is appended hereto marked "F".

17. On May 22, 1980, I received from the Board of Health of Groton a copy of a memorandum addressed on behalf of the Board of Health to the Planning Board of Groton reading as follows:

"We have received your packet of information for the J & C subdivision:

"1. We can make no determination until the gravel has been removed as to how well the land will perc; height of ground water, etc.;

2. Each lot will have to be tested as per title 5 for on-site septic system — then approved or rejected;

3. I will be unable to attend the May 22 Planning Board meeting and if I were, I doubt if the B/H could add anything to what is already known."

17A. A copy of said memo is appended hereto marked "G".

18. Neither J & C nor Dunstable-Groton received any other communication, oral or written, from the Board of Health.

19. More than once during the 1979-1980 period either I or J & C's counsel (in my presence) requested of the Planning Board, orally as well as in writing, that the Planning Board of Groton either approve the subject plan or inform us the details wherein the plan failed to comply with the Board's valid regulations for the stated purpose of modifying the plan accordingly but such requests met with the vote of May 22, 1980, and the testimony in 1988 of the expert hired in 1985.

20. Had the Planning Board or its 1979-1980 (Mr. Ey) consultant expressed or communicated an opinion prior to May 22, 1980, concerning "post-development ground water break-out" referred to above, J & C could have modified the plan and drawn for the Board an interceptor drain on the plan and raised the grade of any lot.

21. The plan modifications dated November 27, 1979 (relating to the surface water drainage system for the entire tract) and March 27, 1980, were made as a result of requests by the Planning Board and such dates are inscribed on the plan.

22. On or about August 9, 1993, Dunstable-Groton Corporation was notified that it was on the agenda for the meeting of the Planning Board to be held on August 19, 1993 at 8 p.m.

and Dunstable-Groton Corporation's representatives so appeared.

23. When such representatives appeared, the Board, through its Chair, immediately informed said representatives, purportedly upon written advice of Counsel in a communication to be privileged, that the Board would consider the plan only if there was compliance with procedures and specifications set forth in amendments to the rules and regulations governing subdivisions of land in Groton and with provisions of amendments to the Zoning By-laws of the Town of Groton adopted at various dates after the original submission on December 22, 1976.

24. Following such statement, the Board, on motion made and seconded, supported the statement and voted accordingly.

25. Members Perkins and Powell were absent and did not vote.

26. Notwithstanding the stated position of the Planning Board set forth in paragraphs 23 and 24, I received notice that the Board called for and set up a public hearing concerning Dunstable-Groton's plan for September 23, 1993, and I attended the hearing.

27. Meanwhile, the Board referred the plan to a new (*i.e.*, third) engineering consultant whose representatives delivered a report to the Board at the hearing.

28. Without discussion of any details thereof by the Board, except the fact that "new" rules and zoning were the standards used and not the "old", the engineering report was adopted by the Board as its own and the Board voted to meet on September 27, 1993, at which to formally vote a disapproval of the plan after Board counsel should have reviewed and approved the form and content of the vote.

29. At the public hearing held September 23, 1993, the Planning Board demonstrated its procedure by adopting the findings of its consultant prior to the above vote without afford-

ing the engineer or the applicant the opportunity to confer with such consultant to discuss and to work out any relevant difficulties or questions [if any] in order to achieve solutions based on the "old" rules and the "old" zoning.

30. On or about September 29, 1993, I received notice that on September 27, 1993, the Board reached the following decision:

> "At a duly posted Planning Board meeting on September 27, 1993, the members in attendance who had been present at the September 23, 1993, public hearing voted unanimously to DENY approval of the definitive plan submitted by Dunstable-Groton Corporation on the grounds that the plan fails to comply with the provisions of the Groton subdivision regulations, Chapter 346, and the Groton Zoning By-Law, Chapter 218, specified above. The members of the Board who were present at the September 27, 1993, meeting and voted to deny approval of the definitive plan were Chairman Virginia Wood, Robert Appleton, Gary Hoglund, Anna Lenos, Carolyn Perkins, and Richard Powell. Member Lewis was absent from the September 23, 1993, public hearing and was not in attendance at the September 27, 1993, meeting and did not vote."

Signed under the pains and penalties of perjury this 8th day of April, 1994.

/s/_____
CHARLES P. MAGRI

APPENDIX H.

TOWN OF GROTON
GROTON, MASSACHUSETTS 01450

OFFICE OF THE
PLANNING BOARD

May 23, 1980

Mr. John Magri
Mr. Charles Magri
J & C Homes
45 Albemarle Road
Norwood, MA 02062

Gentlemen:

As you know, the Planning Board voted unanimously last night May 22, 1980, to deny your application for Coachman Estates II, dated November 1, 1976, with the modification thereto.

The reasons for denial are clearly set forth in the motion worked out by the members of the Planning Board at that meeting:

1) The applicant has failed to supply sufficient information as required by the subdivision regulations in effect at the time of submission of the preliminary plan, namely those adopted July 26, 1963.
2) The proposed major topographic changes are in express violation of the 1963 Subdivision Regulation requirements.

A. *Lack of information*. Information required under Section V-A-1, Sections IV-B-2-k, l, and q, Section IV-B-3-b, Section IV-B-3-c and Section IV-B-4-a has not been provided. The subsurface information provided with the application does not provide

adequate information to determine proper drainage, suitability of land for Board of Health review, and area claimed as buildable land. In addition, no tree planting plan as requested in Section IV-B-2-n has been provided as requested.

The fact that the plans indicate that cuts of up to 30 feet will be made over a large portion of the site and the fact that this plan is being submitted prior to such excavation makes review of the plan particularly difficult and unusual. The long and difficult history of this plan makes it important that the subsurface conditions and potential problems are fully known prior to approval of any plan. We believe that additional subsurface information requested previously, including in our Planning Board letter of October 12, 1979, should be provided prior to any approval.

B. *Topographic changes*. The proposed grading plan is in violation of Section V-A-1 of the Subdivision Regulation of 1963.

Section V-A-2 clearly stipulates that "due regard shall be shown for all natural features". No interpretation of this section can be stretched to encompass the total elimination of all natural features within the majority of the area being developed.

In addition, Section V-C-1 provides the specific requirement that "all streets in the subdivision be designed . . . so that they are adjusted to the topography". Again, no interpretation of this section can be stretched to encompass the 20- to 30-foot cuts proposed by the plan.

No substantive effort has been made to meet Sections V-A-2 or V-C-1 despite repeated requests by the Board to the applicant that he do so, including the Planning Board's motion of January 10, 1980. The Board believes from our own personal observations of the site and from the professional input provided by the Board's engineering consultant, Mr. Bruce Ey, that this site can reasonably be developed without those extreme topographic changes. We feel that the spirit and the letter of those regulations require us to deny this application.

PLANNING BOARD OF THE TOWN OF GROTON

/s/_____
Edna B. White, Chairman

/s/_____
Haines N. Danforth

/s/_____
James Hallet

/s/_____
Alana Knuff

/s/_____
Robert Pine

APPENDIX I.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

LAND COURT DEPARTMENT
MISC. CASE. NO. 199162

Dunstable-Groton Corporation,
Assignee of J & C Homes, Inc.

v.

Planning Board of Groton

AFFIDAVIT OF CHARLES R. TIEDEMANN, JR.

Charles R. Tiedemann, Jr., being first duly sworn, deposes and says, of his own knowledge, as follows:

1. I am a resident of Amherst, New Hampshire.

2. I am President of Amherst Survey Associates, Inc., an existing corporation organized, in 1973, under the laws of the State of New Hampshire.

3. Since 1972, I have been registered by the Commonwealth of Massachusetts as a Registered Professional Land Surveyor, formerly known as Registered Land Surveyor.

4. Since 1972, I have been licensed by the State of New Hampshire as a Licensed Land Surveyor.

5. Since 1974, I have been registered by the State of Maine and Vermont as a Land Surveyor.

6. I have prepared plans subdividing land in Groton, Massachusetts beginning at least from 1975 to date and, in connection with such work, have been and am familiar with the rules and regulations governing the subdivision of land in the Town of Groton promulgated by the Planning Board in effect in 1975 and amended from time to time since then.

7. From 1975 to date, through Amherst Survey Associates, Inc., I have continued to perform and render surveying services for various owners of parcels of land situated in Groton intent upon subdividing land.

8. On July 30, 1993, I delivered to the Planning Board of Groton copies of the definitive plan entitled "Coachman's Estates II" dated November, 1976, modified November 27, 1979, March 27, 1980 and July 24, 1993, together with a letter of transmittal.

9. A copy of the letter of transmittal is appended hereto marked "X".

10. When I delivered the plan and letter, Michelle Collette, a full-time employee serving the Planning Board, informed me that I had to include with such plan certain forms, plans, information and fees which I knew and readily concluded, from past knowledge and experience in dealing with the Board, were requirements of new rules and regulations adopted by the Board from and after 1980 for new applications. I replied to her that this was not a new application under the new rules but was to comply with the Court ruling, all, I continued, as explained in my letter of transmittal.

11. I was present at the meeting of the Planning Board of Groton held on May 22, 1980, during the entire period in which the "Coachman's Estate II" definitive plan (as modified November 27, 1980, and March 27, 1980) was discussed at length, including the motion to disapprove the plan as modified, and the reasons for disapproval.

12. At no time during the course of that meeting or during the course of any other meeting of the Board which I attended at which said plan was discussed, was there ever mentioned a problem of the plan on the subject of "post-development ground water breakout" anywhere within the subdivision, much less in the vicinity of lots 57 and 58 in the proposed way named "Prince Charles Drive", by anyone on the Board or by

Bruce Ey, the engineering consultant engaged by the Board to study the plan and make recommendations to the Board.

13. On or about August 9, 1993, I was notified by Ms. Collette that Dunstable-Groton Corporation would be on the agenda at 8 p.m. for the Planning Board meeting to be held on August 19, 1993.

14. I appeared at 8 p.m. on August 19, 1993, before the Planning Board of Groton. With me in attendance were Charles Magri, President of Dunstable-Groton Corporation, and Eugene L. Tougas, Attorney for Dunstable-Groton Corporation.

15. Neither of the latter two named addressed the Board.

16. When the Chair of the Board called for a representative of Dunstable-Groton Corporation to speak, I identified myself as spokesman and then informed the Board of the purpose of the plan delivered on July 30, 1993, to wit, to comply with the rulings of the Appeals Court in its Memorandum of May 4, 1993.

17. The Board, through its Chair, immediately informed me that, upon written advice of Counsel in a communication declared to be privileged, that the Board would consider the plan only if the plan complied with procedures and specifications set forth in amendments to the rules and regulations governing subdivisions of land in Groton and with provisions of amendments to the Zoning By-laws of the Town of Groton, both adopted at various dates after the original submission on December 22, 1976, of the definitive plan entitled "Coachman's Estates II" referred to in paragraph 11 above.

18. Following such statement, the Board, on motion made and seconded, supported the statement and voted accordingly.

19. Members Perkins and Powell were absent and did not vote.

20. Notwithstanding the stated position of the Planning Board set forth in paragraphs 17 and 18, I later received notice

that the Board called for and set up a public hearing concerning plaintiff's plan on September 23, 1993.

21. Meanwhile, the Board referred the plan to a new (*i.e.*, third) engineering consultant whose representative delivered a report to the Board at the hearing.

22. Without detailed analysis or discussion thereof, the engineering report was then adopted by the Board as its own and the Board voted to meet on September 27, 1993, at which to formally vote a disapproval of the plaintiff's plan after Board counsel should have reviewed and approved the form and content of the vote.

23. At the public hearing held September 23, 1993, the Planning Board demonstrated its procedure by adopting the findings of its consultant prior to the above vote without affording the engineer for the applicant the opportunity to confer with such consultant to discuss and to work out any relevant difficulties or questions (if any) in order to achieve solutions based on the "old" rules and the "old" zoning.

24. On or about September 29, 1993, I received notice that on September 27, 1993, the Board reached the following decision:

> At a duly posted Planning Board meeting on September 27, 1993, the members in attendance who had been present at the September 23, 1993, public hearing voted unanimously to DENY approval of the definitive plan submitted by Dunstable-Groton Corporation on the grounds that the plan fails to comply with the provisions of the Groton subdivision regulations, Chapter 346, and the Groton Zoning By-Law, Chapter 218, specified above. The members of the Board who were present at the September 27, 1993, meeting and voted to deny approval of the definitive plan were chairman Virginia Wood,

Robert Appleton, Gary Hoglund, Anna Lenos, Carolyn Perkins, and Richard Powell. Member Lewis was absent from the September 23, 1993, public hearing and was not in attendance at the September 27, 1993, meeting and did not vote.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 6th day of April, 1994.

/s/_____
Charles R. Tiedemann, Jr.

APPENDIX J.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

LAND COURT DEPARTMENT
MISC. CASE NO. 199162

Dunstable-Groton Corporation,
Assignee of J & C Homes, Inc.

v.

Planning Board of Groton

AFFIDAVIT OF
GEORGE TORRICE

George Torrice, being first duly sworn, deposes and says, of his own knowledge, as follows:

1. I am a resident of Merrimack, New Hampshire.

2. I am a former officer and presently an employee of Amherst Survey Associates, Inc., an existing corporation organized, in 1973, under the laws of the State of New Hampshire.

3. Since 1975, I have been registered by the Commonwealth of Massachusetts as a Registered Professional Land Surveyor, formerly known as Registered Land Surveyor.

4. Since 1976, I have been licensed by the State of New Hampshire as a Licensed Land Surveyor.

5. I was present at the meeting of the Planning Board of Groton held on May 22, 1980, during the entire period in which the "Coachman's Estates II" definitive plan (as modified November 27, 1980, and March 27, 1980) was discussed at length, including the motion to disapprove the plan as modified, and the reasons for disapproval.

6. At no time during the course of that meeting or during the course of any other meeting of the Board which I attended at which said plan was discussed, was there ever mentioned a problem of the plan on the subject of "post-development ground water breakout" anywhere within the subdivision, much less in the vicinity of lots 57 and 58 in the proposed way named "Prince Charles Drive", by anyone on the Board or by Bruce Ey, the engineering consultant engaged by the Board to study the plan and make recommendations to the Board.

Signed under the pains and penalties of perjury at Amherst, New Hampshire, this 6th day of April, 1994.

/s/_____

GEORGE TORRICE

APPENDIX K.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

LAND COURT DEPARTMENT
MISC. CASE NO. 199162

Dunstable-Groton Corporation,
Assignee of J & C Homes, Inc.
Plaintiff

v.

Planning Board of Groton
Defendant

AFFIDAVIT OF
EUGENE L. TOUGAS

I, Eugene L. Tougas, being under oath, hereby depose and state as follows:

1. I am an Attorney admitted to practice in the Commonwealth of Massachusetts, and I have represented J & C Homes, Inc. and Dunstable-Groton Corporation at all times in this case.

2. The copies of pages 153, 165, 183-187, 196, 197, 202-205, 209, and 216-218 of the transcript of the testimony of Robert Daylor at the trial on April 25-26, 1988, of Land Court Case Number 123523 appended hereto are true and accurate copies thereof.

3. The copy of the Motion to Substitute Plaintiff, together with the copy of the instrument entitled "Contract" dated April, 1980, attached thereto and a part thereof, appended hereto are true and accurate copies thereof as assented to and allowed on January 21, 1988, in said case.

Signed under the pains and penalties of perjury this 5th day of April, 1994.

/s/_____
EUGENE L. TOUGAS

APPENDIX L.

[153]

go through the preliminaries and tomorrow I can start on the substance.

ROBERT F. DAYLOR, Sworn
DIRECT EXAMINATION

Q. (By Mr. Wodlinger) Mr. Daylor, your full name and address, please?

A. My name is Robert F. Daylor, D-A-Y-L-O-R. And I live at 33 C Avenue, Quincy, Massachusetts.

Q. And what is your occupation, sir?

A. I am the president of a consulting engineering firm called Daylor Consulting Group, Inc.

Q. And what is your educational background in that area?

A. I have a Bachelor of Science degree from Northeastern University in 1961. I have a graduate degree in —

Q. Pardon me. What field is that Bachelor degree in?

A. The Bachelor's Degree is a Bachelor of Science and Civil Engineering. And I have a Masters of Science in Civil Engineering with a specialty in Environmental engineering from Northeastern University in 1968. And in 1976 and '77, I was awarded a globe fellowship in advanced environmental studies at the

[7]

Q. Now, Mr. Daylor, have you reviewed Exhibit 2, which are the Rules and Regulations of the Planning Board?

A. Yes, sir, I have.

Q. I'm sorry. That's Exhibit 1.

A. Yes, I have reviewed these.
Q. And have you been asked by the Planning Board of Groton to consult with them concerning this subdivision plan subsequent to the filing of the appeal in this action?
A. Yes, sir, I was asked to consult with them.
Q. And have you had occasion to review Exhibit 2, which are the plans of the Coachman Estates 2 subdivision? I show you Exhibit 2.
A. Yes, sir, I have reviewed the Planning Board's records set of these drawings.
Q. And have you also had an opportunity to review the decision of the Planning Board in this case rendered in May 22, I believe, of 1980, which is — May 23, 1980; Exhibit 5?
A. Yes, sir, I did review this.
Q. And have you compared the plans, which are Exhibit 2 with the denial by the Planning Board, Exhibit 5?
A. Yes, sir, we made that comparison.
Q. Now let me direct your attention initially to the Subdivision Rules and Regulations; Exhibit 1, and particularly to section 4B2Q? Do you have that before you?

[2

that's what he's asking for. So, he may continue.
A. In order to determine to make measurements or have data that one could use to make measurements whether or not each of these lots contained a half-acre of — with soils or dry enough to permit the installation and use of disposable sanitary waste, we needed soil information that had been submitted to the Planning Board as shown on Exhibit 4B.
We also looked at what the requirements were for the disposal of sanitary waste in the community; the local Board of Health Regulations. And they are specific about the separation from ground water.

Q. Sir, I show you Exhibit 21, which is Town of Groton Board of Health Approved Regulation Supplemental, Article 9 of the State Sanitary Code and ask you to examine it. Is that the local regulations which you referred to?

A. Yes, sir, it is.

Q. And what other regulations did you review in making your determination of the property?

A. I'm sorry, I didn't understand the question.

Q. Apart from the local regulations, what other regulations did you look at in making your sanitary determination?

A. We looked also at Title 5 of the State Environmental Code, which these local regulations supplement.

Q. And with respect to those two sets of regulations, the

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local and the state, and with respect to the information presented in the boring laws, were you able to make any findings as to suitability for the buildable land criteria?

A. Yes, sir, we were.

Q. And what were those findings?

A. We found that in all likelihood some lots would not conform to the local Board of Health Regulations.

Q. Okay. Now, sir, could you describe for us which lots those were and in what respect you found they would not conform?

A. I, again —

Q. I may just — I'll give you the pointer here.

A. I believe there has been testimony and I will just comment that the site as it was proposed was going to undergo a substantial amount of earth works and earth removal as part of the development. So, that — and that grading is shown on lot six. So, essentially, the landscape we see on the surface would be removed and in some cases removed to substantial depths. What I mean by substantial depths is twenty or thirty or even in some cases more feet.

There is a requirement in the local Board of Health to have five feet of separation depending on when the percolation testing was done. And I'll read from the Board of Health Regulations, that if the testing is done in February, March and April, the wet spring of the year, the

distance from the bottom of the septic system to the ground water elevation must be five feet. And I'm reading from page three of Exhibit 21, I believe. And if the testing was done at some other part of the year, the drier part of the year, then the designs must have six feet minimum from the bottom of the system.

I used that criteria since it is the criteria by which these lots would be judged under the soils dry enough for installation in the system. To look at all of the lots would meet the criteria of having at least a half-acre of dry land.

Q. Now, sir, when you looked at that, was there any particular plan, sheet, in this set which you were referring to?

A. On the first of the sheet sizes, the roadways show — the existing contours show so that one can get an idea of the existing topography of the land. And a proposed contouring show so one could then determine what the post-development contours of circumstances of the land would be. By then superimposing — and there is a plan which shows the boring location, and I believe that plan is in evidence.

Q. That's 4A.

A. So, there was a boring location plan which showed the location of the borings. In essence, that gave us tools by which we could make judgments as to the conformance of the

availability of a half-acre of dry land. We have, if you will, a three-dimensional puzzle. The ground is at a

certain elevation now. Substantial soils are going to be removed and at thirteen locations in the site we have borings which allow us to make judgments about the soil horizons encountered. The presence of rock and the presence of ground water so one could see whether or not when the contours are lowered it would meet the — the lots in their finished state would meet the five feet or six feet, as appropriate, separation requirement.

Actually, if it were six feet you would need about eight feet of separation requirement or —

Q. Separation between what, sir?

A. Between the ground water and the finished grade of the land because if six feet is required from the ground water to the bottom of the system, the system has to be in something. It has to be in the soil itself. And that takes approximately another two feet of material. So, making a comparison of the boring information and the proposed grading allowed us to see whether or not six feet or eight feet of separation would exist in the future on these lots.

Q. Now, sir, with respect to this comparison, what were your findings with respect to specific lots?

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A. We found that lots fifty-one, fifty-two, and fifty-three would not conform to that separation; the required six foot separation.

Q. Now, sir, what was the post-construction proposed grade on lot fifty-nine?

A. On lot fifty-nine the grades ranged from elevation 250, close to the street to approximately elevation 240.

Q. And, sir, how did you reach the conclusion that there would be a problem of the half-acre of buildable land in terms of on-site septic?

A. There is a boring that is — boring B11 that is located approximately 110 feet from Queens Carriage Drive and sits very close to the boundary of lots fifty-nine —

Q. This is different lot numbering. This is a preliminary.
A. The lots are fifty-eight and fifty-nine.
Q. And what did you find in that boring, sir, which led you to conclude that there would be a problem with septic on-site?
A. Actually, in the submitted materials that boring indicated that the earth would actually be excavated below the water table. So, that on — and the location of that boring my recollection is that the water table was encountered at around elevation 242 and the ground was excavated to approximately 240. So, in fact, the soils in that instance would have been excavated directly into the ground water table leaving

your Honor. Can this be marked as a substitute Exhibit 25?
THE COURT: Yes.
MR. WODLINGER: Thank you.
Q. Mr. Daylor, were you provided with a copy of Exhibit 25 in the course of your review?
A. Yes, sir, I was.
Q. And were there any other materials which you were provided with relating to drainage maps?
A. Not that I recall.
Q. Now, having reviewed those exhibits, that material in those exhibits, were you able to reach any conclusions regarding drainage in the subdivision as it relates to the subdivision ways?
A. Yes, sir, I was.
Q. And would you tell us what your findings were with respect to drainage in the subdivision ways?
MR. MITCHELL: Objection, your Honor. As to his opinion.
THE COURT: Well, okay. I suppose — this may be in reverse. You could give the finding, but I want to know

the facts as to what he based his findings on. You may proceed.

A. We found that the drainage solutions were prepared by Mr. Stamski and supported by his calculations would be adequate

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for the carrying of the runoff from storms in the subdivision. And that the set of assumptions he made were in the realm of a reasonable choice of parameters.

Q. And were there any areas within the subdivision ways where the drainage proposed by the plans would create any problems?

A. I think there was such an area where not so much the drainage as proposed, but the lack thereof. I think there would have been problems when one considered the grading on lots fifty-seven, fifty-eight and fifty-nine.

Q. Now, sir, would you tell us what is the basis for your finding of problems in that area?

A. The data that is presented here considered only the surface runoff. And while the borings were made available and are referenced here, the interpretation of those borings as to the soil character I think is a reasonable interpretation. So, that the runoff that was calculated follows that it is reasonable as well.

However, there was no accommodation taken for the fact that the site is going to be graded down into the water table. The ground water table would not stay elevated once that hold is made. Then the ground water would relieve itself. While the ground water divide may shift, the inherent infiltration capacity of the soils will remain.

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there's an opportunity for the water to continue to recharge in there and the fact that the pond level exists at about that level, it's certainly, you know, the pond is

certainly about 230 and the surrounding contour, that what is in evidence is that the surrounding contour is 240. There is not a pond elevation. So, it is something less than 230, but it's clearly —

Q. 240.

A. 240, but it's clearly in that kind of a range. So, we're going to have some equilibrium reestablish itself in the ground water. This grading is quite severe considering the residential nature of the proposed uses of the twenty-nine lots. And what is likely to happen here is that the ground water level will readjust, lower itself. And it lowers itself by breaking out of the surface of the ground, flowing over that ground and flowing into the street drainage system

Q. So, if I understand you are right, there is going to be an additional element of drainage; that is the break out of ground water, which Mr. Stamski's calculations do not include?

A. That's correct. It doesn't raise in my mind a capacity problem in that this flow, with, while it's persistent, it's small, but it does raise construction issues and

suitability issues about the roadway and these lots.

Q. Okay. Now, Mr. Daylor, with respect to the roadway; that is, the subdivision road, Prince Charles Drive, at that elbow, what is a reasonable engineering assumption about the effects of the ground water currently at 242 and that roadway currently being proposed at 220 in elevation?

A. There is not soils information, but clearly the ground water at the road presently cannot be at 242. The ground water is within the existing ground contours. But by lowering this, you would certainly bring it lower to the ground water table. I think the further difficulty here is in trying to build on these lots would be this constant breakout of the ground water. And that fact that in

this lower edge since the edge of the earth excavation area would be an embankment, we're likely to find the ground water stabilizing at or near the elevation of the road bed and subjecting that to freeze and thaw kind of considerations. And certainly icing conditions when you have this ground water constantly seeping. I think that's not an uncommon situation to see —

MR. MITCHELL: I'll object, your Honor. That's purely conjecture on his part.

THE COURT: I don't think it's conjectural if one — it's a common observation. If you've got something below

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the ground water, it's going to be somewhere else.

MR. MITCHELL: It's still opinion, your Honor, I would submit.

THE COURT: Well, that's his opinion as to what would happen under a certain set of circumstances.

MR. MITCHELL: All right.

Q. Now, Mr. Daylor, you made reference to freeze and thaw conditions and a ground water level close to the level of Prince Charles Drive as proposed, what, if any, effect would the freeze and thaw conditions have upon the integrity of that subdivision land?

A. It would —

MR. MITCHELL: I object, your Honor.

THE COURT: Well, I will let him answer.

MR. MITCHELL: Very well.

A. In normal roadway construction and subdivision construction these regulations have — the Subdivision Regulation in this instance have similar requirements. It calls for gravel beneath the pavement section, that gravel serves two purposes. One of which is to provide a free draining sub-base for the roadway so that water is not collected directly beneath the pavement. Until this concrete pavement does not have inherent strength by itself, so that if water — it is supported by that gravel base. If water

were to get in that gravel base and freeze, the expanding ice would push from the underside of the pavement and bend it up and break it. I think all of us who lived in New England have experienced frost heaves. That is that phenomenon. When water trapped in subgrade would then tend to cause those types of problems.

Clearly in instances like this where mass excavations are taking place, it's important to make those considerations.

THE COURT: It could be decided to add extra drainage or something to take care of it?

THE WITNESS: Yes, sir. If there were some designed signed reason for doing this, but if we had to live with this condition, it would be possible to design intercepted drains. Drains on these lot lines. Some type of structures to carry the ground water away. And particularly to dry this sub-basin here.

Q. Now, sir, let me direct your attention to Exhibit 1, if I may, and turn you to roman five, C1A. Do you have that before you, sir?

A. Yes, sir, I do.

Q. And would you read that first paragraph, please?

A. It is headed, Subsection C; Streets. One; location. A; All streets in the subdivision shall be designed so that,

MR. MITCHELL: But he's referring to that —

THE COURT: He can answer it.

A. Yes, the roadways do play a relationship — the grading does play a relationship to the roadways.

Q. And what is that relationship?

A. They — the roadways that are at the lower contour elevations are the down slopes elevations of the proposed

grading. Or if it unaltered the existing grading would receive the runoff from those portions of the land which are upslope with them. So, the rainfall which in part runs off the land, the only way that that could get into the drainage system would be to run into the roadway system and then be carried away.

Q. Thank you, Mr. Daylor.

THE COURT: Let's take a break at this point.

(Short break.)

CROSS EXAMINATION

MR. MITCHELL: Thank you, your Honor.

Q. (By Mr. Mitchell) When were you actually retained, Mr. Daylor?

A. It was in the spring of 1985. I don't recall the exact date, but it was in 1985.

Q. And who contacted you?

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A. I believe the initial contact was with Choate, Hall & Stewart. And they asked if I would come and meet with the Planning Board in Groton.

Q. And in accordance with that review, did you meet with the members of the Planning Board?

A. Yes, sir, I did.

Q. The members that were on the Board at the time that this plan was in effect?

A. No, sir, I don't believe that's correct. I met with the members who were sitting in 1985.

Q. And at the time of the meeting, were you fully aware of this appeal?

A. Yes, sir. I was.

Q. And did you have some discussions with the Planning Board relative to what their position was with respect to this appeal?

A. Yes.

Q. So, it's a fair statement to say that you read the decision that they had made on May 23 of 1980?
A. No, that's not a fair assumption.
Q. So, at the time that you met with the Planning Board, you had not read the decision?
A. That's correct.
Q. So, you did not know the basis at that time upon which they

denied this plan?
A. That's correct.
Q. Now, at that particular time, what documents did you have in your review process? Did you have any of the things that are marked as Exhibits?
A. No, sir. At the initial hearing I merely met with the Board and there was a discussion about the materials that they had. And I offered to assist them and review the materials and formed the opinions that I expressed here this evening
Q. And in the course of doing that, did they give you any instructions as to how you were to proceed?
A. No.
Q. So, it's a fair statement to say that you were charged with the responsibility of reviewing the things that were presented and come up with an independent opinion as to this particular subdivision plan?
A. Yes, sir.
Q. Without any knowledge whatsoever of the decision of May 23, 1980?
A. No. In the materials that I received from them, I received the decision.
Q. So, before you formulated your opinion you had the decision?

APPENDIX M.

TOWN OF GROTON
173 Main Street
P.O. Box 669
Groton, Massachusetts 01450
(508) 448-1105
FAX: (508) 448-1106

Office of the
PLANNING BOARD

September 27, 1993

Carole Clark, Town Clerk
Town Hall
P.O. Box 669
Groton, Massachusetts 01450

Dear Mrs. Clark:

Decision of the Groton Planning Board

Applicant: Dunstable-Groton Corporation, assignee of J & C Homes, Inc.
101 Sycamore Drive
Westwood, Massachusetts 02090

Project: Coachman Estates II Definitive Plan

Premises: Parcel of land located on the easterly side of Old Dunstable Road in Groton, Massachusetts, shown as Assessors' Lot F-12E

Date of Public Hearing: September 23, 1993

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1. Summary

A public hearing was held on September 23, 1993 to consider the definitive subdivision plan entitled, "Coachman Estates II, Subdivision Plan of Land, Groton, Mass., Formerly Owned by J & C Homes, Now Owned by Dunstable-Groton Corp.," prepared by Amherst Survey Associates, Inc., dated November 1, 1976, and revised November 27, 1979, March 27, 1980, and July 24, 1993, as submitted to the Groton Planning Board (the "Board") on July 30, 1993. At a public meeting held on September 27, 1993, members of the Groton Planning Board in attendance voted to DENY approval of the definitive plan submitted by Dunstable-Groton Corporation (Dunstable-Groton) for the reasons stated below.

2. Procedural History

On July 30, 1993, Dunstable-Groton submitted to the Board a definitive subdivision plan for the premises, depicting twenty-nine (29) lots, and consisting of Sheet 1A of 7; Plan and Profile (sheets 2 of 7, 3 of 7, 4 of 7, and 5 of 7); Drainage Flows (sheet 6 of 7); and Easement Plan (sheet 7 of 7). The Board's disapproval of a preceding definitive plan for the same premises, which was submitted to the Board on December 22, 1976 and was revised and resubmitted on November 29, 1979 and May 7, 1980, was the subject of an appeal which upheld the Board's action. *See J & C Homes, Inc.* v. *Planning Bd. of Groton*, No. 91-P-1416, Memorandum and Order Pursuant to Rule 1:28 (May 4, 1993). The July 30, 1993 submission was accompanied by a cover letter dated July 28, 1993 from Charles Tiedemann of Amherst Survey Associates to the Groton Planning Board in which Mr. Tiedemann on behalf of Dunstable-Groton requested that the Board approve the plan on Dunstable-Groton's claim that the plan as modified complies with the May 5, 1993 Appeals Court decision.

In response to Mr. Tiedemann's July 28, 1993 letter, Board voted on August 19, 1993, in the presence of the applicant, that the plan submitted on July 30, 1993 would be reviewed under current zoning and subdivision regulations. By certified mail on August 20, 1993, the Board sent written notice to Mr. Tiedemann and Dunstable-Groton of its vote. The Board also sent Mr. Tiedemann and Dunstable-Groton a copy of the letter to the Board dated August 20, 1993 from the Board's legal counsel Erik Wodlinger of Choate, Hall and Stewart referencing the *Arenstam* v. *Planning Bd. of Tyngsborough* decision.

Pursuant to M.G.L. c. 41, §§ 81T and 81U, the Planning Board held a public hearing on Thursday, September 23, 1993 at 8:30 p.m. at the Town Hall. Chairman Wood opened the public hearing. Clerk Clayton Perkins read the public hearing notice published in September 3 and 10, 1993 issues of *The Groton Herald*. The members of the Board present at the public hearing were Chairman Virginia Wood, Robert Appleton, Gary Hoglund, Anna Lenos, Carolyn Perkins, and Richard Powell; Member Robert Lewis was absent. At the public hearing, Charles Tiedemann of Amherst Survey Associates responded to questions on behalf of Dunstable-Groton. Lisa Brothers of Judith Nitsch Engineering, Inc. (JNEI), the Board's consulting engineer, submitted a letter dated September 23, 1993 to the Groton Planning Board and responded to questions regarding her letter.

The Board stated that the plan submitted on July 30, 1993 must comply with current zoning and subdivision regulations. Prior to closing the public hearing, the Chairman Wood asked Mr. Tiedemann if the applicant would like to submit a revised plan that complies with current zoning and subdivision regulations. Mr. Tiedemann said he would stand by his position as stated in his July 28, 1993 letter to the Board.

At the meeting on September 23, 1993, the motion was made by Powell that the application submitted by Dunstable-Groton Corporation on July 30, 1993 for approval of the Coachman Estates II definitive plan be DENIED for the following reasons:

1. The plan does not meet current subdivision regulations and the current Zoning By-Law as detailed in the JNEI letter dated September 23, 1993.

2. The Planning Board's position that this plan must comply with current subdivision regulations and zoning is based upon advice of legal counsel as stated in the letter dated August 20, 1993 and Erik Wodlinger of Choate, Hall and Stewart to the Planning Board referencing the *Arenstam* v. *Planning Bd. of Tyngsborough* decision.

3. The decision will be drafted by the Planning Assistant and reviewed by the Board's legal counsel prior to the Board taking the final vote.

The motion was seconded by Appleton.

The Board announced that it would hold a duly posted public meeting on Monday, September 27, 1993 at 7:00 p.m. in the Town Hall to vote on its decision.

3. Findings and Conclusions

The Board makes the following findings and conclusions:

The definitive plan submitted by Dunstable-Groton is a new filing which shall be reviewed in accordance with the Town of Groton's subdivision rules and regulations and zoning regulations in effect on July 30, 1993, the date the plan was sub-

mitted. This application is governed by *Arenstam* v. *Planning Bd. of Tyngsborough*, 29 Mass. App. Ct. 314, 317-18 (1990), in which the Appeals Court held that the "grandfather" protection of M.G.L. c. 40A, § 6, did not apply to an amended definitive plan which modified the original plan to address the reasons for disapproval but was filed more than seven months after submission of the preliminary plan. In this instance, the zoning freeze which protected the preceding plan while it was being processed expired when the Board disapproved the plan and its disapproval was upheld by the Appeals Court.

Therefore, in submitting its definitive plan, Dunstable-Groton must comply with the requirements of Chapter 346, Subdivision of Land, from the Code of the Town of Groton, as amended through January 7, 1993. In accordance with §§ 346-9(B), 346-8(B)(10) and 346-8(B)(18), the definitive plan must conform to the requirements of Chapter 218, the Zoning By-Law of the Town of Groton, as amended through January 25, 1992.

The definitive plan submitted by Dunstable-Groton fails to comply with numerous subdivision and zoning regulations of the Town of Groton. The specific provisions with which the plan does not comply are set forth in the JNEI letter to the Board dated September 23, 1993. The letter, which is based upon an analysis of the definitive plan submitted on July 30, 1993, and does not reflect the preceding plans for the same premises, is attached to this decision and is incorporated herein by reference. (Even if the July 30, 1993 submission was reviewed in conjunction with the preceding submissions to the Board, the plan nonetheless fails to comply with current zoning and subdivision regulations for many of the reasons cited in the JNEI September 23, 1993 letter.)

4. Decision

At a duly posted Planning Board meeting on September 27, 1993, the members in attendance who had been present at the September 23, 1993 public hearing voted unanimously to DENY approval of the definitive plan submitted by Dunstable-Groton Corporation on the grounds that the plan fails to comply with the provisions of the Groton subdivision regulations, Chapter 346, and the Groton Zoning By-Law, Chapter 218, specified above. The members of the Board who were present at the September 27, 1993 meeting and voted to deny approval of the definitive plan were Chairman Virginia Wood, Robert Appleton, Gary Hoglund, Anna Lenos, Carolyn Perkins, and Richard Powell. Member Lewis was absent from the September 23, 1993 public hearing and was not in attendance at the September 27, 1993 meeting and did not vote.

Any person aggrieved by this decision may appeal within 20 days of the filing of this decision with the Town Clerk under the provisions of M.G.L. c. 41, § 81BB.

GROTON PLANNING BOARD

/s/_____
Virginia Wood, Chairman

/s/_____
Robert J. Appleton, Jr.

/s/_____
Gary Hoglund

/s/_____
Anna Lenos

/s/_____
Carolyn Perkins

/s/_____
Richard W. Powell

APPENDIX N.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Middlesex, ss.

Miscellaneous
Case No. 123523

J & C HOMES, INC.
Plaintiff

vs.

HENRY S. MILLER, HAINES H. DANFORTH, DOUGLAS L. JAMES, JOSEPH C. SKINNER and EDNA B. WHITE, as they are members of and constitute the PLANNING BOARD OF GROTON
Defendants

DECISION

The Plaintiff herein, J & C Homes, Inc. ("J & C"), is the owner of an undeveloped tract of land ("locus") in Groton, Massachusetts, consisting of approximately 40 acres. By this action, J & C appeals pursuant to the provisions of G.L. c. 41, § 81BB from a decision of the Defendant, Planning Board of Groton ("Board"), dated May 22, 1980, denying its application for approval of a definitive subdivision plan (Exhibit No. 2) of the locus, entitled "Coachmans Estates II", dated November 1, 1976 ("Original Plan") and revised on November 27, 1979 ("Modified Plan"), and later on March 27, 1980 ("Final Modified Plan").

The case was transferred from Middlesex Superior Court to the Land Court on March 17, 1987. Thereafter, a trial was held on April 25 and April 26, 1988 at which times a stenographer was appointed to record and transcribe the testimony. Counsel stipulated to the admission of seven of the thirty-one exhibits introduced into evidence and to certain facts which are set forth below. Ten chalks were also presented to assist the Court. All exhibits and chalks have been incorporated herein for the purpose of any appeal. The Court viewed the locus in the presence of counsel on April 26, 1988.

On all of the evidence, I find the following facts:

1. The locus is situated in the "R-A Residential — Agricultural District," as defined in Section V-A of the Groton Zoning By-laws ("By-laws") (Exhibit No. 3). The entire tract is comprised of irregular and steep hills, as well as ridges and deep gullies. It is not situated within a sewered area nor is it near a public water supply. Accordingly, development of the locus as proposed will require extensive excavation and the construction of individual wells and subsurface sewage disposal systems to service the lots within the subdivision.

2. On December 22, 1976, J & C submitted its Original Plan of the proposed subdivision to the Board. Such plan depicted a three-lot subdivision.

3. The Board's review of J & C's Plans was conducted in accordance with the Groton subdivision rules and regulations ("Regulations") (Exhibit No. 1) adopted on July 26, 1963.

4. A copy of the Original Plan was duly filed with the Groton Board of Health ("Board of Health") and, by letter dated March 15, 1977 (Exhibit No. 22), such Board reported to the Planning Board that the three parcels, numbered Lots 31, 32 and 33 on the Original Plan, were suitable for subsurface sewage disposal.

5. On March 26, 1977, the Board unanimously approved J & C's application, subject to its compliance with certain con-

ditions to be, and which were, imposed by the Board at a later date. J & C duly appealed this decision on April 14, 1977 pursuant to the provisions of G.L. c. 41, § 81BB. Thereafter on July 17, 1979, the Massachusetts Appeals Court held that the Board's "conditional approval" of J & C's application was insufficient under the Open Meeting Law, G.L. c. 39, § 23B, as the Board subsequently met at a *private* session to determine those conditions which were so imposed on J & C. Accordingly, the matter was remanded to the Board. *See J. & C. Homes, Inc., et al.* v. *Planning Board of Groton*, 8 Mass. App. Ct. 123, 125 (1979).

6. Following the remand, the Board considered J & C's application. Bruce L. Ey ("Mr. Ey"), a Registered Professional Engineer, was retained by the Board to review J & C's Original Plan.

7. By letters addressed to the Board, dated October 9, 1979 (Exhibit No. 7), October 12, 1979 (Exhibit No. 8) and November 8, 1979 (Exhibit No. 10), Mr. Ey reported that the Board should request additional information from J & C as to soil and drainage conditions, number of house lots and dwelling units thereupon, changes in topography, traffic impact, potable water supply and location of septic facilities, wells, trees and houses.

8. In response to the Board's recommendations, J & C submitted its Modified Plan, depicting 29 lots, to the Board on November 29, 1979. Accordingly, Mr. Ey reviewed the Modified Plan, approved of the drainage calculations implemented therein and concluded that only a small increase in surface water runoff would ensue from development of the locus. He further noted that, although boring tests indicated there to be suitable soil for subsurface sewage disposal, Boring B-11 (Exhibit No. 4B) indicated excavation below ground water level. He recommended that further boring tests be performed and that the date of all such tests be submitted.

9. On May 7, 1980, J & C submitted its final Modified Plan, which is the subject of this appeal, to the Board. The Board of Health acknowledged receipt of such plan by letter (Exhibit No. 18) addressed to the Board, dated May 19, 1980, and noted therein that the proposed subdivision would require the removal of approximately 482,000 cubic yards of material. Thereafter, on May 22, 1980, the Board notified J & C (Exhibit No. 20) that its Final Modified Plan failed to adequately address matters of subsurface sewage disposal, grading and topography.

10. On May 22, 1980, the Board voted unanimously to deny J & C's application for subdivision approval, citing the Final Modified Plan's failure to comply with some ten sections of the Regulations (Exhibit No. 5). Specifically, the Board stated that J & C failed to provide sufficient information under the following Regulations:

1.) Section V-A-1

Soil and Drainage. No land shall be subdivided for residential use, if after investigation, the Board of Health determines that it cannot be used for building purposes without danger to health or safety. The Planning Board may, in particular instances, require satisfactory evidence that soil conditions and natural drainage are suitable for the proposed subdivision from the point of view of sanitation and public health.

2.) Section V-B-2-k

The Definitive Plan shall contain park or open areas suitably located for conservation, playground or recreation purposes within a subdivision, if any.

3.) Section IV-B-2-l

The Definitive Plan shall contain proposed storm drainage of land, including existing natural waterways and the proposed disposition of water from the proposed subdivision to adequate natural drainage channels or artificial means of disposal thereof.

4.) Section IV-B-2-q

The Definitive Plan shall contain area claimed as "Buildable Land" and approximate proposed location of main building on each lot to comply with Zoning By-Law, whenever uncertainty exists or upon the request of the Board, or Board of Health.

5.) Section IV-B-3-b

The Definitive Plan shall be accompanied by data and copies of proposed arrangements for water supply, sewerage and sewage disposal including all appurtenances, as required by the Board of Health.

6.) Section IV-B-3-c

Plans and profiles of development shall show all provisions made for proper drainage of the area, including location and sized of drain lines, catch basins, culverts, etc.

7.) Section IV-B-4-a

At the time of filing of the Definitive Plan, the applicant shall stake all proposed lots and mark proposed lot numbers on said lots to facilitate review of the Definitive Plan by the appropriate authorities.

8.) Section IV-B-2-n

The Definitive Plan shall contain location and species of proposed street trees and/or individual trees or wooded areas to be retained within forty (40) feet of the sidelines of each street.

The Board further alleged that the major topographic changes proposed by J & C violated the following Regulations:

9.) Section V-A-2

Due regard shall be shown for all natural features, such as large trees, watercourses, boulders or rock outcrops, as well as for scenic assets, which, if preserved, will add attractivenesss and value to the property.

10.) Section V-C-1-a

All streets in the subdivision shall be designed so that, in the opinion of the Board, they will provide safe vehicular travel and natural drainage with no drainage pockets, and so that they are adjusted to the topography and provide the minimum number of intersections with major streets.

The party appealing a decision of the Planning Board pursuant to G.L. c. 41, § 81BB bears the burden of proving to the trier of fact that such decision was improper and beyond the scope of the Board's authority. *Strand* v. *Planning Board of Sudbury*, 7 Mass. App. Ct. 935, 936 (1979); *Fairbairn* v. *Planning Board of Barnstable*, 5 Mass. App. Ct. 171, 173 (1977); *Mac-Rich Realty Construction* v. *Planning Board of Southborough*, 4 Mass. App. Ct. 79, 83 (1976). In hearing and deciding appeals under section 81BB, the duties of the Court

are to conduct a hearing *de novo*, find the relevant facts and to confine its review to the reasons stated by the Planning Board for its disapproval of the subdivision plan. *Fairbairn* at 173; *Mac-Rich* at 81; *Canter* v. *Planning Board of Westborough*, 4 Mass. App. Ct. 306, 307 (1976). A finding by the Court that any one of the substantial reasons propounded by the Board for its denial of subdivision approval is a valid reason will warrant a determination that the Board's action be affirmed. *Mac-Rich* at 80-81. The Court herein rules that inasmuch as the Board has withheld subdivision approval based on at least one legally tenable ground, its denial must be sustained.

SUFFICIENCY OF BOARD'S REASONS FOR DENIAL OF PLAN

A.) Soil and Drainage Considerations Under Sections V-A-1, IV-B-2-l and IV-B-3-c

J & C's Definitive Plan shows excavations of up to thirty feet in certain areas. Specifically, the proposed subdivision requires the removal of approximately 482,000 cubic yards of earth and drastic alterations in the site's natural topography. Despite the obvious magnitude of such excavation, the Plan addresses only the matter of increased surface water run-off after development. There is scant information provided as to the serious problem of post-development ground water breakout. (*See* Exhibit 4A). Accordingly, as such information on existing and proposed soil and drainage conditions is essential to the Board's competent evaluation of J & C's Plan, the Board did not exceed its given authority in withholding subdivision approval from the Plan due to its noncompliance with *section V-A-1* of the Regulations. *Loring Hills Developers Trust* v. *Planning Board of Salem*, 374 Mass. 343, 351, 352 (1978)

citing *United-Reis Homes, Inc.* v. *Planning Board of Natick*, 359 Mass. 621, 623-24 (1971). Similarly, the Board's denial was properly based upon J & C's noncompliance with *section IV-B-2-l* of the Regulations, which requires the developer to provide sufficient information relative to the prevention of any adverse impact from the proposed storm drainage system on property situated outside the subdivision's boundaries. *Vitale* v. *Planning Board of Newburyport*, 10 Mass. App. Ct. 483, 485 (1980); *United-Reis* at 625. Conversely, however, that basis of the Board's denial which is rooted in J & C's alleged failure to provide sufficient information as to proposed provisions for drainage under *section IV-B-3-c* of the Regulations must fail. The Plan and Profiles submitted by J & C evidence compliance with this regulation insofar as they depict the size and location of drain lines and similar facilities (Exhibit No. 1, Sheets Nos. 2 of 7, 3 of 7, 4 of 7 and 5 of 7).

B.) Water Supply, Sewerage and Sewage Disposal Considerations Under Section IV-B-3-b

General and reasonable Planning Board regulations which require the developer to show suitable arrangements for servicing the utility and water needs of the subdivision have been upheld. *Rounds* v. *Board of Water and Sewer Commissioners*, 347 Mass. 40, 46 (1964); *Wheatley* v. *Planning Board of Hingham*, 7 Mass. App. Ct. 435, 439-40 (1979). However, health questions with respect to the disposal of sewage in a subdivision which is not connected to municipal sewer services are the exclusive domain of the Board of Health. *Fairbairn* at 176.

Regulation *IV-B-3-b* requires the Definitive Plan to include proposed arrangements for water supply, sewerage and sewage disposal as required by the Board of Health. In the instant case,

neither of the communications between the Planning Board and the Board of Health with respect to J & C's Plan included requests for water supply data. Furthermore, the only reference such Board ever made to sewage disposal matters was by its letter of March 15, 1977 (Exhibit No. 22) wherein it approved J & C's proposed arrangements for subsurface sewage disposal as shown on the Original Plan. The Board of Health subsequently failed to report on such arrangements as exhibited on J & C's Modified and Final Modified Plans which both depicted 29 lots. Consequently, the Board of Health's failure to file such a report amounted to its approval of J & C's Plans under G.L. c. 41, § 81U. Accordingly, the Planning Board overstepped the bounds of its authority in basing its denial of subdivision approval on J & C's noncompliance with *section IV-B-3-b.*

C.) Parks, Open Areas, and Trees as Required Under Sections IV-B-2-k and IV-B-2-n

Before approving a definitive plan, a Planning Board may require such plan to show a park or parks suitably located for playground or recreation purposes. G.L. c. 41, § 81U. Accordingly, *section IV-B-2-k* of the Regulations provides in pertinent part that:

> The Definitive Plan *shall* contain park or open areas . . . within the subdivision *if any* (emphasis supplied).

The word "shall" in the regulation, standing alone, makes the developer's compliance therewith mandatory, however, the presence of the words "if any" at the end renders such compliance directory. The regulation is thus not reasonably definite so as to give the developer advance notice of what is required of him and what standards and procedures will apply to him.

Mac-Rich at 82 citing *Castle Estates, Inc.* v. *Park and Planning Board of Medfield*, 344 Mass. 329, 334 (1962). Similarly, *section IV-B-2-n* imposes the rather broad requirement that the developer's plan depict the location and species of street and individual trees, as well as wooded areas, to be retained within 40 feet of the street sidelines. While the requirement as to the showing of "wooded areas" is reasonable, the requirement as to specific trees presents difficulty. The regulations is phrased, "street trees and/or individual trees . . . to be retained." A reasonable interpretation of such regulation leads the developer to believe that he may elect to retain none, some or all of such natural features on the site. The reality of the situation, however, is that should the developer decide to retain all of the trees within 40 feet of the street sidelines, he is presented with the potentially overwhelming task of showing the location and species of countless trees, irrespective of size, age and the like. Alternatively, should he choose to retain few, if any, of these trees, he runs the risk of his action being challenged thereafter by the Board, Tree Warden, environmental and conservation authorities, or others of similar authority. In short, the regulation is too vague and general to sufficiently inform the developer about the standards which he must meet in retaining or removing such trees. *Castle Estates* at 334; *Chira* v. *Planning Board of Tisbury*, 3 Mass. App. Ct. 433, 438 (1975).

The Board therefore acted improperly in basing its denial of subdivision approval on J & C's noncompliance with *sections V-B-2-k* and *IV-B-2-n* of the Regulations.

D.) Buildable Land and Proposed Lots Under Sections *IV-B-2-q and IV-B-4-a*

The Board contends that J & C's Plan violates *section IV-B-2-q* of the Regulations in that it fails to designate "buildable land" and

the approximate location of the main building on each lot within the subdivision. Conversely, J & C argues that such regulation is unenforceable under G.L. c. 41, § 81Q, as it relates to the use of the lots. While it is true under section 81Q that planning board regulations may not relate to the size, shape, width, frontage or use of lots within a subdivision, or to the buildings to be constructed thereon, inquiry into these matters by the Planning Board or the Board of Health is permissible in certain circumstances. *Loring Hills* at 351. In the instant case, however, I do not find circumstances which are comparable to those found in *Loring Hills*. There, the Planning Board requested the developer to furnish information about the subdivision's "prospective character," such as dwelling size, type and location. The Court deemed this request reasonable and valid since the developer's plans showed 81 acres of land divided into eight lots sufficient to accommodate some 2,532 dwelling units and about 6,000 people. *Id.* at 350. Further, in *Loring Hills*, the developer was free to develop his locus in alternative ways within that particular zoning district. To the contrary, J & C proposes to construct a 29-lot subdivision within a "Residential — Agricultural District" where residential uses are restricted to single-family dwellings. There is no chance of J & C's developing the locus in "alternative ways." In addition, the Subdivision Control Law itself imposes no obligation on a developer to construct dwellings within his subdivision, as lots may be sold out to individual buyers desiring to build homes suited to their own architectural tastes and family needs. *Fairbairn* at 184. Accordingly, the Board acted improperly in basing its denial of J & C's subdivision application on noncompliance with *section IV-B-2-q*.

That portion of the Board's denial which cites J & C's failure to comply with *section IV-B-4-a* of the Regulations is also invalid, but only insofar as it requires the developer to stake all proposed lots upon the filing of the Definitive Plan with the

Board. Such requirement is unduly burdensome and without legal justification in view of the fact that following approval of his definitive plan, the developer is free to alter the number, size and shape of the lots, without further action of the Board, so long as such lots retain frontage on a public way. G.L. c. 41, § 81O. Further, as the regulation is wholly unrelated to protecting the safety, convenience and welfare of the Town's inhabitants, it runs afoul of the general purposes for which the Subdivision Control Law was enacted. G.L. c. 41, § 81M. Therefore, as such requirement appears to have been adopted solely for the convenience and accommodation of the Planning Board and similar authorities, it may not constitute a basis to the Board's denial of J & C's application.

E.) Natural Features and Topography Under Sections V-A-2 *and V-C-1-a*

The evidence proffered at trial indicates that J & C's proposed subdivision gives little, if any, regard to the natural features and topography of the locus. Development of the site calls for the excavation of some 482,000 cubic yards of gravel, with cuts of nearly thirty feet in some areas, as well as the removal of many, if not all, existing trees. In essence, J & C's Plans resemble a gravel-removal operation more than a subdivision. The Plans thus evidence a total disregard for the natural features of the site in direct contravention of *section V-A-2*. Further, they illustrate that rather than adjust the subdivision streets to the natural topography of the site as required by *section V-C-1-a*, J & C is adjusting the topography to his proposed road layout. Considering the degree of destruction and excavation involved in J & C's proposed subdivision, and the fact that J & C's claimed objective of constructing a subdivision could well be achieved by less drastic measures, the Board did not exceed its authority or

abuse its discretion in requiring J & C to submit information as to the retention of "natural features" on the site nor as to the proposed grades involved therein. *See Loring Hills* at 351 citing *United-Reis* at 623, 624.

In consideration of the foregoing, I therefore rule that the Board's denial of approval of J & C's Definitive Plan was supported by legally tenable reasons and should be upheld. However, as the policy of the Subdivision Control Law is to encourage the Planning Board and developer to produce, by joint efforts, the most desirable development plans for the community, J & C should be entitled to resubmit its most recent Definitive Plan following its compliance with the Board's valid requests under *sections IV-B-2-l, IV-B-2-n, IV-B-4-a, V-A-1, V-A-2* and *V-C-1* of the Groton Subdivision Regulations. Once J & C's Plan conforms to such Regulations, the Board, upon satisfaction of its concerns outlined above, proceed in accordance with G.L. c. 41, § 81U.

The Plaintiff and Defendant have submitted requests for findings of fact, which I have considered. Certain of these requests have been incorporated herein. I have taken no action on the remainder, as I have made my own findings as to those facts which I deem pertinent.

Judgment accordingly.

/s/_____

Robert V. Cauchon
Justice

Dated: January 13, 1989

APPENDIX O.

J. & C. HOMES, INC. & OTHERS[1] *vs.* PLANNING BOARD OF GROTON
(and a companion case).

Middlesex. March 19, 1979. – July 17, 1979.

Present: ARMSTRONG, ROSE, & DREBEN, JJ.

Subdivision Control, Conditions, Appeal. *Practice, Civil,* Appeal from interlocutory order.

A planning board's vote at a public hearing to approve a developer's plan subject to "such conditions which would show due regard for the concerns expressed at the public hearing" was insufficient to comply with the open meeting provisions of G.L. c. 39, § 23B, where the board subsequently met in private to determine what conditions would be imposed on the developer. [125]

A Superior Court judgment annulling a decision of the planning board and ordering it to undertake further proceedings was interlocutory, and an appeal from the judgment was premature. [125-126]

TWO CIVIL ACTIONS commenced in the Superior Court on April 6, 1977, and April 14, 1977, respectively.

The cases were heard by *Geenty*, J., a District Court judge sitting under statutory authority.

Eugene L. Tougas for the plaintiffs.

Douglas F. Seaver (*Brian A. O'Connell* with him) for the defendant.

[1] Three registered voters of the town of Groton.

DREBEN, J. These are appeals in two actions which were consolidated for trial. In the first action, the plaintiffs claimed that the planning board of Groton (board) violated G.L. c. 39, §§ 23A-23B, the Massachusetts open meeting law; in the second action, an appeal pursuant to G.L. c. 41, § 81BB, J. & C. Homes, Inc. (the developer), claimed that the board exceeded its authority in imposing certain conditions as a prerequisite to approval of the developer's plan. The plaintiffs and the board both appeal from a single judgment entered in both actions which ordered the board not to violate G.L. c. 39, § 23B, in its future meetings and which ordered further proceedings and adjudged the vote of the board to be null and void. The plaintiffs also appeal from the denial of their post-judgment motion seeking to have the board ordered to approve the plan without the conditions.

The facts are taken from a stipulation of the parties and from the judge's findings, which were made after an evidentiary hearing. The findings, not being clearly erroneous, are binding on us. Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974).

At a public hearing a vote was taken by the board, which approved the developer's application subject to the developer's entering into a covenant containing "such conditions which would show due regard for the concerns expressed at the public hearings." At the time of adjournment of the public meeting, neither the developer nor the public knew the substance of all of the conditions which were to be imposed on the developer, and in fact at that time the decision of the board had not yet been reached. The judge found that there "was a meeting [of the minds] in private, of a quorum of the [p]lanning [b]oard, after the public meetings were ended, for the purpose of deciding on or deliberating . . . on the matter of the [developer's] plan."

1. The vote at the public hearing was insufficient since it merely anticipated that conditions would be imposed. The sub-

stance of such conditions was not make known to the developer and to any possible objectors. See *Strand* v. *Pianning Bd. of Sudbury*, 5 Mass. App. Ct. 18, 23-24 (1977); *Patelle* v. *Planning Bd. of Woburn*, 6 Mass. App. Ct. 951 (1978); See also *Pieper* v. *Planning Bd. of Southborough*, 340 Mass. 157, 160-161 (1959). On these facts the judge was correct in concluding that the board had not met the burden imposed on it under G.L. c. 39, § 23B, to show that its actions were in accord with the open meeting provisions. The order to the board not to violate G.L. c. 39, § 23B, in all future hearings is a proper remedy under that section.

2. The appeals from the judge's orders concerning the conditions imposed by the board must be dismissed, as they are from what is, in effect, an interlocutory order. The "order of judgment," entered after rulings by the judge that some of the conditions imposed by the board were invalid, adjudged the vote of the board "null and void" and ordered further proceedings to be taken under the applicable statutes and the board's rules and regulations. This was not a final judgment.

These appeals are governed by the reasoning of *Roberts-Haverhill Associates* v. *City Council of Haverhill*, 2 Mass. App. Ct. 715, 720 (1974), and cases there cited, and the language of that case is apposite here. "Even though the present controversy may not be resolved in the course of the further proceedings before the [board], it may well be resolved in the course of ensuing proceedings in the Superior Court. Depending on the action taken by the [board] . . . issues which now seem important may lose their significance or even disappear altogether; if such issues retain any vitality, they may be considered on an appeal from a final judgment of the Superior Court. In addition, the further action of the [board] may give rise to new issues which cannot be anticipated or resolved at this juncture. We believe that such considerations require us . . . to conclude that the present appeals have been taken from an interlocutory decree and must, therefore, be dismissed."

A single form of judgment was entered in both actions. In Superior Court No. 77-1717 the judgment is to be modified by striking the portions purporting to dispose of the plaintiff's appeal under G.L. c. 41, § 81BB, and, as so modified, the judgment is affirmed. In Superior Court No. 77-1871, the docket entries should be amended to indicate that the "order of judgment" is not a final judgment, and that order should be amended to include a provision that the Superior Court will retain jurisdiction over the action. See *Roberts-Haverhill Associates* v. *City Council of Haverhill*, 2 Mass. App. Ct. at 721. The appeals in Superior Court No. 77-1871 are dismissed.

So ordered.

APPENDIX P.

MASSACHUSETTS GENERAL LAWS.

40A:6. Existing structures, uses, or permits; certain subdivision plans; application of chapter.

Section 6. Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to billboards, signs and other advertising devices subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D or to adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.

A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or

construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.

A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans

are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval, except in the case where such plan was submitted or submitted and approved before January first, nineteen hundred and seventy-six, for seven years from the date of the endorsement of such approval. Whether such period is eight years or seven years, it shall be extended by a period equal to the time which a city or town imposes or has imposed upon it by a state, a federal agency or a court, a moratorium on construction, the issuance of permits or utility connections.

When a plan referred to in section eighty-one P of chapter forty-one has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under applicable provisions of the subdivision control law. Such appeal shall stay, pending an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance or by-law which became effective after the date of submission of the plan first submitted.

In the event that any lot shown on a plan endorsed by the planning board is the subject matter of any appeal or any litigation, the exemptive provisions of this section shall be extended for a period equal to that from the date of filing of said appeal or the commencement of litigation, whichever is earlier, to the date of final disposition thereof, provided final adjudication is in favor of the owner of said lot.

The record owner of the land shall have the right, at any time, by an instrument duly recorded in the registry of deeds for the district in which the land lies, to waive the provisions of this section, in which case the ordinance or by-law then or thereafter in effect shall apply. The

submission of an amended plan or of a further subdivision of all or part of the land shall not constitute such a waiver, nor shall it have the effect of further extending the applicability of the ordinance or by-law that was extended by the original submission, but, if accompanied by the waiver described above, shall have the effect of extending, but only to extent aforesaid, the ordinance or by-law made then applicable by such waiver.

41:81Q. **Planning board; adoption of rules and regulations.**

Section 81Q. After a public hearing, notice of the time and place of which, and of the subject matter, sufficient for identification, shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing or if there is no such newspaper in such city or town then by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing, a planning board shall adopt, and, in the same manner, may, from time to time, amend, reasonable rules and regulations relative to subdivision control not inconsistent with the subdivision control law or with any other provisions of a statute or of any valid ordinance or by-law of the city or town. Such rules and regulations may prescribe the size, form, contents, style and number of copies of plans and the procedure for the submission and approval thereof, and shall be such as to enable the person submitting the plan to comply with the requirements of the register of deeds for the recording of the same, and to assure the board of a copy for its files; and shall set forth the requirements of the board with respect to the location, construction, width and grades of the proposed ways shown on a plan and the installation of municipal services therein, which requirements shall be established in such manner as to carry out the purposes of the subdivision control law as set forth in section eighty-one M. Such rules and regulations shall not require referral of a subdivision plan to any other board or person prior to its submission to the planning board. In establishing such requirements regarding ways, due regard shall be paid to the prospective character of different subdivisions, whether open residence, dense residence, business or industrial, and the prospective amount of travel upon the various ways therein, and to adjustment of the requirements accordingly; provided, however, that in no case shall a city

or town establish rules or regulations regarding the laying out, construction, alteration, or maintenance of ways within a particular subdivision which exceed the standards and criteria commonly applied by that city or town to the laying out, construction, alteration, or maintenance of its publicly financed ways located in similarly zoned districts within such city or town. Such rules and regulations may set forth a requirement that a turnaround be provided at the end of the approved portion of a way which does not connect with another way. Any easement in any turnaround shown on a plan approved under the subdivision control law which arises after January first, nineteen hundred and sixty, other than an easement appurtenant to a lot abutting the turnaround, shall terminate upon the approval and recording of a plan showing extension of said way, except in such portion of said turnaround as is included in said extension, and the recording of a certificate by the planning board of the construction of such extension. Such rules and regulations may set forth a requirement that underground distribution systems be provided for any and all utility services, including electrical and telephone services, as may be specified in such rules and regulations, and may set forth a requirement that poles and any associated overhead structures, of a design approved by the planning board, be provided for use for police and fire alarm boxes and any similar municipal equipment and for use for street lighting. The rules and regulations may encourage the use of solar energy systems and protect to the extent feasible the access to direct sunlight of solar energy systems. Such rules and regulations may include standards for the orientation of new streets, lots and buildings; building set back requirements from property lines; limitations on the type, height and placement, of vegetation; and restrictive covenants protecting solar access not inconsistent with existing local ordinances or by-laws. Except in so far as it may require compliance with the requirements of existing zoning ordinances or by-laws, no rule or regulation shall relate to the size, shape, width, frontage or use of lots within a subdivision, or to the buildings which may be constructed thereon, or shall be inconsistent with the regulations and requirements of any other municipal board acting within its jurisdiction. No rule or regulation shall require, and no planning board shall impose, as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any

other public purpose, without just compensation to the owner thereof. The rules and regulations may, however, provide that not more than one building designed or available for use for dwelling purposes shall be erected or placed or converted to use as such on any lot in a subdivision, or elsewhere in the city or town, without the consent of the planning board, and that such consent may be conditional upon the providing of adequate ways furnishing access to each site for such building, in the same manner as otherwise required for lots within a subdivision. A true copy of the rules and regulations, with their most recent amendments, shall be kept on file available for inspection in the office of the planning board of the city or town by which they were adopted, and in the office of the clerk of such city or town. A copy certified by such clerk of any such rules and regulations, or any amendment thereof, adopted after the first day of January, nineteen hundred and fifty-four shall be transmitted forthwith by such planning board to the register of deeds and recorder of the land court,. Once a definitive plan has been submitted to a planning board, and written notice has been given to the city or town clerk pursuant to section eighty-one T and until final action has been taken thereon by the planning board or the time for such action prescribed by section eighty-one U has elapsed, the rules and regulations governing such plan shall be those in effect relative to subdivision control at the time of the submission of such plan. When a preliminary plan referred to in section eighty-one S has been submitted to a planning board, and written notice of the submission of such plan has been given to the city or town clerk, such preliminary plan and the definitive plan evolved therefrom shall be governed by the rules and regulations relative to subdivision control in effect at the time of the submission of the preliminary plan, provided that the definitive plan is duly submitted within seven months from the date on which the preliminary plan was submitted.

41:81U. **Approval, modification or disapproval of plan by board; prerequisites for decision.**

Section 81U. When a definitive plan of a subdivision is submitted to the planning board, as provided in section eighty-one O, a copy thereof shall also be filed with the board of health or board or officer having like powers and duties. Such health board or officer shall, within forty-five

days after the plan is so filed, report to the planning board in writing, approval or disapproval of said plan, and, in the event of disapproval, shall make specific findings as to which, if any, areas shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefor in such report, and where possible, shall make recommendations for the adjustments thereof. Failure of such board or officer to report shall be deemed approval by such board or officer. Such health board or officer shall send a copy of such report, if any, to the person who submitted said plan. When the definitive plan shows that no public or community sewer is to be installed to serve any lot thereon, approval by a board of health or officer shall not be treated as, nor deemed to be approval of a permit for the construction and use on any lot of an individual sewage system; and approval of a definitive plan for a subdivision by a board of health or officer shall not be treated as, nor deemed to be, an application for a permit to construct or use an individual sewage system on any lot contained therein.

After the hearing required by section eighty-one T and after the report of said health board or officer or lapse of forty-five days without such report, the planning board shall approve, or, if such plan does not comply with the subdivision control law or the rules and regulations of the planning board or the recommendations of the health board or officer, shall modify and approve or shall disapprove such plan. In the event of disapproval, the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations. The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for the purpose, and shall send notice of such action by registered mail, postage prepaid, to the applicant at his address stated on the application.

If the report of the board of health or board or officer having like powers and duties shall so require, the approval by the planning board shall be on condition that no building or structure shall be built or placed upon the areas designated without consent by such board of health or officer. In the event approval by the board of health or board or officer having like powers and duties is by failure to make a report, the planning board shall note on the plan that health approval is by failure to report.

In the case of a nonresidential subdivision where a preliminary plan has been duly submitted and acted upon or where forty-five days has elapsed since submission of the said preliminary plan, and then a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

In the case of a subdivision showing lots in a residential zone, where a preliminary plan has been acted upon by the planning board or where at least forty-five days has elapsed since submission of the preliminary plan, an applicant may file a definitive plan. The failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action on the definitive plan within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

In the case of a subdivision showing lots in a residential zone, where no preliminary plan has been submitted and acted upon or where forty-five days has not elapsed since submission of such preliminary plan, and a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within one hundred thirty-five days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

Before endorsement of its approval of a plan, a planning board shall require that the construction of ways and the installation of municipal services be secured by one, or in part by one and in part by another, of the methods described in the following clauses (1), (2), (3) and (4) which method or combination of methods may be selected and from time to time varied by the applicant:

(1) By a proper bond, sufficient in the opinion of the planning board to secure performance of the construction of ways and the installation of municipal services required for lots in the subdivision shown on the plan, and the planning board may require that the applicant specify the time within which such construction shall be completed.

(2) By a deposit of money or negotiable securities, sufficient in the opinion of the planning board to secure performance of the construction of ways and the installation of municipal services required for lots in the subdivision shown on the plan, and the planning board may require that the applicant specify the time within which such construction shall be completed.

(3) By a covenant, executed and duly recorded by the owner of record, running with the land, whereby such ways and services shall be provided to serve any lot before such lot may be built upon or conveyed, other than by mortgage deed; provided, that a mortgagee who acquires title to the mortgaged premises by foreclosure or otherwise and any succeeding owner of such premises or part thereof may sell any such lot, subject to that portion of the covenant which provides that no lot shall be built upon until such ways and services have been provided to serve such lot; and provided, further, that nothing herein shall be deemed to prohibit a conveyance by a single deed, subject to such covenant, of either the entire parcel of land shown on the subdivision plan or of all lots not previously released by the planning board. A deed of any part of the subdivision in violation hereof shall be voidable by the grantee prior to the release of the covenant but not later than three years from the date of such deed.

(4) By delivery to the planning board of an agreement executed after the recording of a first mortgage covering the premises shown on the plan or a portion thereof given as security for advances to be made to the applicant by the lender, which agreement shall be executed by the applicant and the lender and shall provide for the retention by the lender of funds sufficient in the opinion of the planning board and otherwise due the applicant, to secure the construction of ways and the installation of municipal services. Said agreement shall also provide for a schedule of disbursements which may be made to the applicant upon completion of various stages of the work, and shall further provide that in the event the work is not completed within the time set forth by the applicant, any funds remaining undisbursed shall be available for completion.

Any covenant given under the preceding paragraph and any condition required by the health board or officer shall be either inscribed on the plan or contained in a separate document, referred to on the plan.

The penal sum of any such bond held under clause (1) or any deposit held under clause (2) or any amount of funds retained pursuant to an agreement under clause (4) shall bear a direct and reasonable relationship to the expected cost including the effects of inflation, necessary to complete the subject work. Such amount or amounts shall from time to time be reduced so that the amount bonded, deposited or retained continues to reflect the actual expected cost of work remaining to be completed.

Upon the completion of the construction of ways and the installation of municipal services in accordance with the rules and regulations of the planning board, security for the performance of which was given by bond, deposit or covenant, or upon the performance of any covenant with respect to any lot, the applicant shall send by registered mail to the city or town clerk and the planning board a written statement that the said construction or installation in connection with which such bond, deposit or covenant has been given has been completed in accordance with said rules and regulations, such statement to contain the address of the applicant. If the planning board determines that said construction or installation has been completed, it shall release the interest of the town in such bond and return the bond or the deposit to the person who furnished the same, or release the covenant by appropriate instrument, duly acknowledged, which may be recorded. If the board determines that said construction or installation has not been completed, it shall specify in a notice sent by registered mail to the applicant and to the clerk of the city or town the details wherein said construction or installation fails to comply with its rules and regulations and upon failure so to do within forty-five days after the receipt by said clerk of said statement all obligations under the bond shall cease and terminate by operation of law, any deposit shall be returned and any such covenant shall become void. In the event that said forty-five day period expires without such specification, or without the release and return of the bond or return of the deposit or release of the covenant as aforesaid, the said clerk shall issue a certificate to such effect, duly acknowledged, which may be recorded.

Any such bond may be enforced and any such deposit may be applied by the planning board for the benefit of such city or town, as provided in

section eighty-one Y, upon failure of the performance for which any such bond or deposit was given to the extent of the reasonable cost to such city or town of completing such construction and installation.

In any town which accepts the provisions of this paragraph, the proceeds of any such bond or deposit shall be made available to the town for expenditure to meet the cost and expenses of the municipality in completing the work as specified in the approved plan. If such proceeds do not exceed one hundred thousand dollars, the expenditure may be made without specific appropriation under section fifty-three of chapter forty-four; provided, however, that such expenditure is approved by the board of selectmen. The provisions of this paragraph shall not apply to cities or to towns having town councils.

Before approval of a plan by a planning board, said board shall also in proper cases require the plan to show a park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area in relation to the area of the land being subdivided and the prospective uses of such land, and if so determined said board shall by appropriate endorsement on the plan require that no building may be erected on such park or parks for a period of not more than three years without its approval.